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Supreme Court of the United States

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
and
BROTHERHOOD OF RAILROAD SIGNALMEN,
Petitioners,

v.

BNSF RAILWAY COMPANY,
and
HON. GARY GIRON, in his capacity as Cabinet Secretary,
New Mexico Department of Transportation,
Respondents.

On Petition For A Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 2 Seventh of the Railway Labor Act (RLA) prohibits a carrier from changing the working conditions "of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6" of the Act. 45 U.S.C. § 152 Seventh. The RLA also establishes in Section 3 of Act, 45 U.S.C. § 153, "adjustment boards" to resolve disputes "growing out of grievances or out of the interpretation or application of [collective-bargaining] agreements" (45 U.S.C. § 153 First (i))–*i.e.*, "minor disputes." This Petition raises the following questions:

1. Does a federal court have jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) to enforce the command of RLA Section 2 Seventh that a carrier comply with its collective-bargaining agreements where RLA adjustment boards also have jurisdiction over the underlying contract enforcement dispute, but, unlike federal courts, do not have a special competence to resolve the question of law–here, a railroad's common carrier obligations under the Interstate Commerce Act–which must first be decided to determine whether the carrier is breaching its contractual commitments, and only a federal court can fashion a remedy that mandates future compliance with the collective-bargaining agreement–and thus, with Section 2 Seventh?

2. May federal courts exercise jurisdiction over a state officer under the *Ex parte Young* (209 U.S. 123 (1908)) doctrine's exception to a State's sovereign immunity that the Eleventh Amendment to the Constitution of the United States recognizes, where the State officer is not accused of violating federal law, but the officer's presence is required under Rule 19(a), Fed. R. Civ. P., to enforce federal law that is being violated by the continued application of a contract which the State officer administers?

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In The

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Brotherhood of Maintenance of Way Employes Division,
International Brotherhood of Teamsters,
and
Brotherhood of Railroad Signalmen,
Petitioners,

v.

BNSF Railway Company,
and
Hon. Gary Giron, in his capacity as Cabinet Secretary,
New Mexico Department of Transportation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioners Brotherhood of Maintenance of Way Employes Division (BMWED) of the International Brotherhood of Teamsters, and Brotherhood of Railroad Signalmen (BRS) respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the judgment of that court, which was entered on March 2, 2010, in *BMWED v. Burlington Northern Santa Fe Ry.* This petition also seeks review of the judgment of the United States District Court for the District of New Mexico, dismissing the State of New Mexico's Secretary» of the Department of Transportation from this litigation.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 596 F3d 1217 and is reproduced in the Appendix to this Petition as Appendix A, beginning at 1a. That ruling affirmed the

district court's judgment dismissing petitioners' complaint. None of the district court's opinions or orders dismissing the complaint and denying in part petitioners' Rule 59(e), Fed. R. Civ. P., motion to alter or amend, are officially reported; they are reproduced herein as Appendix B at 20a (Memorandum Opinion and Order, entered September 17, 2008; unofficially reported at 2008 WL 5489360 and 185 L.R.R.M. (BNA) 2761), Appendix C at 36a (Order of Dismissal, entered September 13, 2007) and Appendix D at 39a (Transcript of oral ruling given on September 11, 2007). A decision by the Surface Transportation Board served on February 6, 2006, in Finance Docket 34793, granting the State of New Mexico's Department of Transportation's motion to dismiss the Department's exercise of a class exemption to acquire ownership of the rail lines at issue, is also relevant to this case. That decision has not been reported, but may be found at the Board's web site, www.stb.dot.gov, and herein as Appendix E at 44a.

JURISDICTION

The Tenth Circuit's judgment was entered on March 2, 2010. This petition is timely since it is being filed within 90 days of the date that judgment was entered. 28 U.S.C. § 2101(c). Petitioners seek to invoke the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves the proper relationship between the jurisdiction Congress has given federal courts under 28 U.S.C. §§ 1331 and 1337(a) over federal questions, including suits arising under acts of Congress regulating interstate commerce, such as the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.*, and jurisdiction Congress has given

adjustment boards established under the RLA over disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ." 45 U.S.C. § 153 First (i). RLA Sections 2 First, 2 Seventh, 3 First (i), (m) and (p), and 6, 45 U.S.C. §§ 152 First, 152 Seventh, 153 First (i), (m) and (p), and 156, are relevant to this Petition and they, along with 28 U.S.C. §§ 1331 and 1337, are reproduced in Appendix F to this Petition beginning at 48a.

This case also involves the question of whether federal courts may assert jurisdiction over a state officer under the *Ex parte Young*[1] exception to a state's sovereign immunity, which sovereignty the Eleventh Amendment protects, when the state officer is named as a required party under Rule 19(a), Fed. R. Civ. P., in an injunction action to enforce federal law where there is no allegation that the state officer is violating that federal law. The Eleventh Amendment and Rule 19 are reproduced in Appendix F at 48a and 52a, respectively.

STATEMENT OF THE CASE

A. Federal Court and Adjustment Board Jurisdiction.

The Court has long recognized that when Congress enacted the Railway Labor Act, it "thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings." *Texas & New Orleans R.R. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 567 (1930); *see also*, *Chicago & North Western Ry. v. UTU*, 402 U.S. 570, 577 (1971) ("[W]e think it plain that § 2 First [45 U.S.C. § 152 First] was intended to be more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a

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[1] *Ex parte Young*, 209 U.S. 123 (1908).

legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis"). This case raises the question of whether RLA Section 2 Seventh[2] imposes "definite obligations enforceable by judicial proceedings" (*Texas & New Orleans R.R.*, 281 U.S. at 567) in cases involving what are known as "minor disputes"–*i.e.*, disputes "growing . . . out of the interpretation or application of [collective] agreements" (45 U.S.C. § 153 First (i))–which Congress has created adjustment boards to resolve.

RLA Section 2 Seventh, which was added to the RLA in 1934 in the same legislation by which Congress made the arbitration of unresolved minor disputes compulsory (Pub. L. No. 441, 48 Stat. 1185,1188), has a twofold purpose: "it operates to give legal and binding effect to collective agreements, and it lays down the requirement that collective agreements can be changed only by the statutory procedures." *Detroit & Toledo Shore Line R.R. v. UTU* ["*Shore Line*"], 396 U.S. 142, 156 (1969). Congress obviously intended Section 2 Seventh to express more than an hortatory wish, for, as the Court observed in *Shore Line*, 396 U.S. at 156: "The violation of this section is a criminal offense punishable by imprisonment or fine or both." *See*, 45 U.S.C. § 152 Tenth.

While Section 2 Seventh's command is straight forward, the role that federal courts are to play in enforcing its command has been severely limited since *Consolidated Rail Corp. v. RLEA* ["*Conrail*"], 491 U.S. 299 (1989), for the lower courts have read that decision as requiring them to treat all aspects of controversies involving the *enforcement* of collective bargaining agreements as raising minor dis-

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[2] RLA § 2 Seventh provides that: "No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

putes within the *exclusive* jurisdiction of adjustment boards and over which the courts lack jurisdiction, including jurisdiction to enforce Section 2 Seventh. This unwarranted, expansive view of adjustment board jurisdiction–and correspondently narrow view of the role federal courts are to play in enforcing the RLA–deprives Section 2 Seventh of its force, for every breach of a collective bargaining agreement is a *change* in agreements prohibited by Section 2 Seventh. *See, Conrail*, 491 U.S. at 320-21 (White, J., concurring) ("If the [Adjustment] Board decides that the company is wrong about its authority under the contract, the result will be that the company has sought a change in the contract without invoking the procedures applicable to major disputes").

Conrail addressed *only* one aspect of the relationship between the jurisdiction of federal courts and that of adjustment boards over RLA disputes, for it examined *only* the proper way to determine how to classify the underlying dispute involving *changes* to existing agreement-based rates of pay, rules, or working conditions as being either a "major" or a "minor" dispute. Changes to existing agreements are called "major disputes," while disputes over the "interpretation or application of [existing] agreements concerning rates of pay, rules, or working conditions" (RLA § 3 First (i)) are called "minor disputes." Proper classification is important, since Congress has provided two significantly different procedures to resolve disputes concerning such *changes*.

Simply stated, "major disputes" are to be raised by a written notice to change agreements (RLA § 6), and are to be resolved by "conferences" (RLA § 2 Second, 45 U.S.C. § 152 Second), mediation under Section 5 First of the Act, 45 U.S.C. § 155 First, and, if the President so decrees, by investigation of an Emergency Board under Section 10 of the Act, 45 U.S.C. § 160. This dispute resolution process is "pur-

posely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Shore Line*, 396 U.S. at 149, *quoting Brotherhood of Railway & Steamship Clerks v. Florida East Coast R.R.*, 384 U.S. 238, 246 (1966).

But, if no agreement has been reached at the end of this process for resolving major disputes, either party may use self-help to convince the other to accept its position. Arbitration of the dispute is purely voluntary. Section 7 First, 45 U.S.C. § 157 First ("[T]he failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise"). Moreover, while the dispute is working its way through this process, it is subject to the Act's status quo obligation, which requires both parties "to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Shore Line*, 396 U.S. at 153.

"Minor disputes," on the other hand, are subject to *compulsory arbitration*, for if the parties are unable to resolve the dispute through conferences, either party may submit the dispute to the appropriate adjustment board for final and binding resolution. *See, Union Pacific R.R. v. BLET General Committee of Adjustment Central Region*, 558 U.S. _____, ____ (2009) (No. 08-604, Slip Op. at 3).[3] Moreover, minor disputes are *not* subject to the Act's status

[3] The Court observed in *Union Pacific*, Slip Op. at 3, that the 1926 RLA (Pub. L. No. 257, 44 Stat. 577) had provided "a framework for the settlement and voluntary arbitration of 'minor disputes'" which soon proved inadequate since "[m]any railroads . . . resisted voluntary arbitration." "Congress therefore amended the Act in 1934 . . . to mandate arbitration of minor disputes").

quo obligation. *Conrail*, 491 U.S. at 310 ("We hold that if an employer asserts a claim that the parties' agreement gives the employer the discretion to make a particular change in working conditions without prior negotiation, and if that claim is arguably justified by the terms of the parties' agreement . . . , the employer may make the change and the courts must defer to the arbitral jurisdiction of the Board").

Thus, as *Conrail* observed, the correct classification of the underlying dispute over changes to agreement terms is important to the proper administration of the RLA. 491 U.S. at 305-06. But, since litigants often see things as they would like them to be rather than as they are, "protection of the proper functioning of the statutory scheme requires the court to substitute its characterization for that of the claimant." 491 U.S. at 306. *Conrail* then articulated the standard courts should apply in classifying the underlying dispute (491 U.S. at 307):

> Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major.

This instant case, however, raises the issue of whether the proper classification of the underlying dispute as being major or minor is *also* determinative of the jurisdiction of federal courts to enforce the RLA. It is well settled that federal courts have subject-matter jurisdiction to enforce compliance with the Act's major dispute procedures before a carrier may *change* its existing agreements (*Conrail*, 491 U.S. at 303 ("The district courts have subject-matter jurisdiction to enjoin a violation of the status quo pending completion of the required [major dispute] proce-

dures"))-which is the same as saying that federal courts have subject-matter jurisdiction to enforce Section 2 Seventh's command that collective agreements *not* be *changed* except in compliance with the Act's major dispute procedures. It is equally well settled that Congress has given RLA adjustment boards jurisdiction to resolve disputes "growing . . . out of the interpretation or application of [collective] agreements . . . ." 45 U.S.C. § 153 First (i).[4] Thus, there is an obvious overlap between the jurisdiction adjustment boards have over minor disputes and the jurisdiction federal courts have over Section 2 Seventh.

That overlap, however, is limited by the role Congress has given RLA adjustment boards over minor disputes -including jurisdiction over *frivolous* contract interpretation issues embedded within a major dispute. As the Court explained in *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 565 (1946), "Congress has specifically provided for a tribunal to interpret contracts . . . in order finally to settle a labor dispute." By making resort to adjustment boards compulsory, Congress "intended to leave a minimum responsibility to the courts" over minor disputes. 326 U.S. at 566. Courts may not interpret RLA collective-bargaining agreements (CBAs). 326 U.S. at 567-68.

Pitney, however, did not go as far as the lower courts have gone, especially since *Conrail*, for *Pitney* recognized in a case involving the enforcement of the RLA's protection of agreement rights, that, while "the [district] court should not have interpreted the contracts for purposes of finally adjudicating the dispute between the unions and the rail-

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[4] Title II of the RLA extends the Act's coverage to the airline industry, and Section 204 of the Act similarly requires that disputes "growing . . . out of the interpretation or application of [collective] agreements" involving airline employees be resolved by an "appropriate adjustment board" if any party to the dispute so requests. 45 U.S.C. § 184.

road" (326 U.S. at 567-68), there was a relationship between the district court's jurisdiction to enforce the RLA and the adjustment board's jurisdiction to authoritatively interpret the contract (*Id.* at 568; footnote omitted):

> The dismissal of the cause should . . . be stayed by the District Court, so as to give an opportunity for application to the Adjustment Board for an interpretation of the agreements. Any rights clearly revealed by such an interpretation might then, if the situation warrants, be protected in this proceeding.

This case presents a related question, for it asks the Court to determine whether, as the Tenth Circuit held, the jurisdiction Congress has given RLA adjustment boards over minor disputes is *exclusive* over all aspects of a controversy that includes a minor dispute, divesting federal courts of jurisdiction over RLA Section 2 Seventh? Or, as petitioners maintain, may federal courts exercise jurisdiction over Section 2 Seventh to enjoin changes to collective agreements where the actual controversy separating the parties involves a dispute over a question of law involving another federal statute–here, the Interstate Commerce Act–and a line-sale agreement over which adjustment boards have no jurisdiction? In other words, may federal courts *enforce* collective agreements in controversies that do not involve the *interpretation* of agreements? *See, Conrail*, 491 U.S. at 305 ("The distinguishing feature of such a case [*i.e.*, classifying a dispute as minor] is that the dispute may be conclusively resolved by interpreting the existing agreement").

B. *Ex parte Young* and Rule 19(a), Fed. R. Civ. P.

The second question presented by this Petition asks whether federal courts may assert jurisdiction over a

state officer–here, New Mexico's Cabinet Secretary for its Department of Transportation (NMDOT)–where minor and ancillary injunctive relief is initially being sought against the state officer to enforce federal law, but the state officer is not alleged to have violated federal law. Petitioners named the Secretary as a Rule 19(a), Fed. R. Civ. P., defendant because they were seeking relief that would affect the Secretary–a declaratory judgment that a portion of NMDOT's sale agreement with respondent BNSF Railway Company violated the RLA, an injunction to prohibit sales of BNSF's rail lines to NMDOT until the offending provision was reformed, and possibly an injunction requiring the Secretary to reform NMDOT's contracts with BNSF to end the ongoing violation of federal law for the lines already sold *if* the Secretary did not agree to reform the agreement.

The district court dismissed the Secretary for two reasons, both of which stemmed from the fact that petitioners had not accused the Secretary of violating federal law. First, the court concluded that petitioners, by not asserting that the Secretary was violating a legal duty owed to them, had not asserted a claim upon which relief could be granted from the Secretary. App. C at 37a. And second, since petitioners had not asserted that the Secretary was violating federal law, the *Ex parte Young*[5] exception to a State's sovereign immunity did not apply. *Id.* The Tenth Circuit did not address those rulings because it found its affirmance of the district court's RLA ruling obviated the need to address jurisdiction over the Secretary. App. A at 19a.

STATEMENT OF FACTS

A. The Line Transfer Transaction.

This Petition arises from an agreement that respondent BNSF entered into with NMDOT in 2005 by which BNSF

[5] *Ex parte Young*, 209 U.S. 123 (1908).

agreed to sell in four installments a significant portion–but not all–of its interests in approximately 280 miles of its rail lines around Albuquerque, New Mexico and from Belen, New Mexico to the Colorado New Mexico boarder near Trinidad, Colorado. Appendix in 10th Cir. No. 08-2232 [hereinafter, "Cir. App."] at 220.[6] BNSF, however, did not sell all of its interests in its rail lines, for as the Quitclaim Deeds provide, it "reserve[d] for itself and its successors and assigns an exclusive easement for freight railroad purposes, including, but not limited to, the construction, maintenance, repair, replacement and operation of freight rail and associated facilities, subject to the provisions of the Joint Use Agreement . . . ." *E.g.*, Belen to Bernalillo Quit Claim Deed at ¶ (1), Cir. App. at 250.[7]

BNSF and NMDOT structured their sale agreement in this manner so that NMDOT would not become a rail carrier subject to the jurisdiction of the Surface Transportation Board (STB) under Section 10501 of the Interstate Commerce Act (ICA), 49 U.S.C. § 10501. If BNSF and NMDOT had not structured their sale as they did, that sale would have been subject to Section 10901 of the ICA, which requires prior STB approval (or the exer-

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[6] Three of the line sales have closed, but the fourth–and largest, involving approximately 182 miles of track from Lamy, New Mexico to the Colorado/New Mexico boarder near Trinidad, Colorado–which was scheduled to close in December 2008 (Cir. App. at 350), has yet to close.

[7] BNSF's retained interests in its right-of-way is essentially the same interests that most railroads have in their rights-of-way, which is exclusive easements to provide common carrier service. *See, Preseault v. ICC*, 494 U.S. 1, 8 (1990) ("[M]any railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests"); *Great Northern Ry. v. United States*, 315 U.S. 262, 271-77 (1942) (Land grants to railroads since 1871 "convey[] but an easement").

cise by the purchaser of a class exemption that STB's predecessor gave in *Class Exemption for Acquisition & Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd sub nom. Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (Table). But, if they had followed the Section 10901 route, NMDOT would have become a carrier subject to the STB's jurisdiction, for the "acquisition of an active railroad line necessarily makes [the acquiring entity, including a state] . . . a common carrier, even though the [state] . . . did not intend to operate the line." *Southern Pacific Transportation Co.-Abandonment*, 8 I.C.C.2d 495, 504 (1992). *See, State of Maine, Department of Transportation–Acquisition and Operation Exemption*, 8 I.C.C.2d 835, 836-37 (1991) ("Under § 10901, we have exclusive jurisdiction over the acquisition of a railroad line by a non-carrier (including a state) where the common carrier rights and obligations are also to be transferred, *in whole or in part*") (emphasis added).

Beginning with its *State of Maine* decision, the Interstate Commerce Commission (ICC), and now its successor, the STB, have taken the position that the agency does not have jurisdiction over a line sale if the transaction is structured in such a way that "no common carrier rights or obligations are being transferred." *State of Maine*, 8 I.C.C.2d at 837. As the ICC explained, where the acquiring entity does not assume any common carrier rights or obligations and nothing in the transaction would prevent the selling carrier from complying with its common carrier obligations, the concerns of § 10901 are not implicated. *State of Maine*, 8 I.C.C.2d at 837.[8]

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[8] As the ICC stated in *State of Maine* (8 I.C.C.2d at 837; footnotes omitted):

[N]othing in the transfer of underlying assets in this case would disenable MEC [the selling carrier] from meeting its common carrier obligation. The permanent and unconditional easement which it

On December 6, 2005, NMDOT filed with the STB a Notice that it was exercising the Class Exemption from ICA § 10901 to acquire the BNSF's lines, but at the same time it filed a motion to dismiss that notice for lack of jurisdiction. According to NMDOT, the STB lacked jurisdiction over the line transfer because the state was *not acquiring* "the property and contractual rights necessary to conduct or control common carrier freight operations on the line . . . ." App. E at 46a. The STB agreed, and on February 6, 2006, it served its decision dismissing the notice of exemption for lack of jurisdiction. App. E at 47a. As the STB explained (App. E at 46a-47a):

> The record shows that BNSF would not be transferring common carrier rights or obligations and that NMDOT would not hold itself out as a common carrier performing rail freight service. The agreements between NMDOT and BNSF show that NMDOT would acquire only the physical assets but not the contractual rights necessary to conduct, control or interfere with common carrier freight operations on the line. BNSF would continue to provide its freight service over the line. Under these circumstances, we find that NMDOT would not become a rail carrier subject to the Board's jurisdiction as a result of the transaction.

B. The Labor Dispute.

At the same time they entered into the sales agreements, BNSF and NMDOT entered into another agreement–called the Joint Use Agreement (JUA)–by which they allocated responsibilities for their respective uses of the lines. As rel-

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retains ensures MEC . . . both the full right and necessary access to maintain, operate and renew the line. . . . Under these circumstances we can see no reason to impose upon the purchaser of the underlying rail assets an additional common carrier obligation.

evant here, BNSF contracted with NMDOT for the Department to "be responsible for the management and maintenance of the Rail Corridor [*i.e.*, the transferred lines], subject to BNSF's Retained Freight Easement . . . ." Cir. App. at 225-26 (JUA at § 2.1.C). That agreement further provided that "NMDOT shall invoice BNSF monthly for BNSF's share of maintenance costs for portions of the Rail Corridor used by both Parties" on a gross ton miles basis and on its actual, but reasonable, costs for lines used only by BNSF. *Id.* at 228-29 (§§ 2.2.E and .G).

BNSF is also a party to agreements with petitioners by which it has agreed that its employees will maintain its rights-of-way (BMWED) and signals (BRS). *See, St. Louis Southwestern Ry. v. BRS*, 665 F.2d 987, 995 (10th Cir. 1981), *cert. denied*, 456 U.S. 945 (1982) ("[T]he day to day [craft] work of railroads is to be performed by employees of the company who are members of the applicable union"). Petitioners contend that since BNSF did not transfer to NMDOT *any* of its common carrier rights and obligations, BNSF retained the obligation under the ICA to maintain its right-of-way. To support that position, petitioners have relied upon both court and Commission decisions explaining that an essential part of a carrier's common carrier obligations under the ICA is its obligation to maintain and repair its right-of-way. *E.g.*, *ICC v. Maine Central R.R.*, 505 F.2d 590, 593 (2d Cir. 1974) ("A railroad has a duty under both the Interstate Commerce Act and under its state franchises to maintain and repair its lines and provide service thereon"); *BLE v. Staten Island Rapid Transit Operating Authority*, 360 I.C.C. 464, 472 (1979) ("Included in the common carrier duties in that certificate [to operate a rail line], and assumed by the city, is the obligation to furnish and maintain adequate transportation and transportation facilities, including rail, ties, and equipment for the movement of property in interstate commerce"), *aff'd*, 718 F.2d 533 (2d Cir. 1983).

Petitioners have also relied upon the STB's decision dismissing NMDOT's notice for lack of jurisdiction to argue that NMDOT did not acquire *any* common carrier obligations–including the common carrier obligation to maintain the right-of-way–when it bought the interests that BNSF sold it in the rail lines on which petitioners work. That maintenance obligation, petitioners assert, remains with BNSF.

Consequently, petitioners have argued, BNSF's contract with NMDOT assigning to NMDOT the responsibility to maintain the right-of-way over which it is continuing to operate, breached BNSF's collective-bargaining agreements with petitioners, which assigned that work to BNSF employees. Petitioner BMWED brought suit in March 2006 against BNSF and NMDOT's Secretary in the United States District Court for the District of New Mexico for declaratory judgments that BNSF "has a nondelegable obligation under the ICA to maintain its right of way" and that it violated RLA Section 2 Seventh by assigning that work to NMDOT. Cir. App. at 26 (Complaint). Petitioner also sought to enforce RLA Section 2 Seventh by enjoining the sales that had yet to be consummated and to require BNSF and the Secretary to reform the JUA so as to cure the RLA violations caused by BNSF's unlawful assignment of its maintenance work to NMDOT. Cir. App. at 27. Petitioners subsequently filed an amended complaint adding BRS as a plaintiff.[9]

Respondents successfully asked the district court to dismiss the complaint. First, the court concluded that the complaint failed to state a claim against the Secretary since the complaint did not allege that the Secretary owed a duty to BNSF's employees. App. C at 37a. Whether the Secretary might "in the future violate the Railway Labor Act [by refus-

[9] Petitioners sought to amend the complaint in November 2006 to add BRS as a plaintiff; that motion was granted in September 2008. Cir. App. at 6 (Doc. 64), 8 (Doc. 110).

ing to reform the JUA] . . . [was] speculative and premature, and fails to state a claim upon which relief may be granted." *Id.* Second, *Ex parte Young* did not provide an exception to the Secretary's exercise of New Mexico's sovereign immunity since the unions were not alleging that the Secretary was currently violating federal law and such a claim is essential to invoke *Ex parte Young*'s exception. *Id.* And finally, the district court agreed with BNSF that petitioners' efforts to enforce their right to maintain BNSF's right-of-way and signals raised a minor dispute within the exclusive jurisdiction of RLA adjustment boards since BNSF claimed an arguable right to sell its rail lines and transfer its maintenance obligations to NMDOT. App. C at 38a.

After the district court's ruling was issued, BNSF responded to grievances petitioners had filed with BNSF, which asserted that BNSF's transfer of the maintenance responsibility to NMDOT violated the governing collective agreements. In its responses, BNSF asserted that the claims petitioners had raised were "based on an argument of law, rather than of labor contract." Cir. App. at 423. As BNSF stated in its response to the BRS (Cir. App. at 423-44):

> You are arguing that the carrier may not, as a matter of law, divide its "common carrier obligations" from its sale to the State of New Mexico. All these labor claims are really based on notions that require interpretation of the Interstate Commerce Act (particularly 45 [*sic*] USC 11101), Surface Transportation Board (STB) jurisdiction and powers, or both. These are clearly functions outside of the jurisdiction of any board of adjustment, and BNSF does **not** consent to confer any such jurisdiction.

See also, Cir. App. at 416; 409 ("BNSF would not consent to placing before a board of adjustment any issues concerning federal statutes, other than the RLA itself").

Petitioners asked the district court under Rule 59(e), Fed. R. Civ. P., to alter or amend its judgment, relying in part upon BNSF's acknowledgment that RLA adjustment boards lacked jurisdiction to decide issues concerning the proper interpretation of the ICA and the sale documents. *See*, Cir. App. at 255-57. The district court, however, found that BNSF's recognition of the limited jurisdiction of adjustment boards did not alter the court's conclusion that the controversy between the parties raised a minor dispute within the exclusive jurisdiction of the adjustment boards. As the court explained (App. B at 32a):

> Plaintiff alleges that its members have the contractual right to perform the maintenance work at issue. BNSF contends that Plaintiff's members have no right to perform work on track sold to a third party, and has plausible contractual justifications for its actions. This is the very essence of a minor dispute over which this Court has no jurisdiction. . . .

Petitioners appealed to the Tenth Circuit, but on March 2, 2010, the appellate court entered its judgment affirming the district court's judgment, addressing solely the issue involving the proper classification of the dispute. In rejecting petitioners' argument that district courts had subject-matter jurisdiction to enforce RLA Section 2 Seventh, the appellate court stated: "[T]his is not a case involving the unilateral creation of a new collective bargaining agreement or even new terms or rights under the existing CBA. Instead, it falls comfortably under *Conrail*'s default category of minor disputes in which a party seeks to enforce a collective bargaining agreement." App. A at 19a. According to the Tenth Circuit, the question of whether the district court had subject-matter jurisdiction turned on the proper classification of the dispute as being major or minor, and the "essence of [that]

. . . inquiry is whether the source of a party's asserted legal right is its collective bargaining agreements." App. A at 9a.

Here, as all agree, the "source" of petitioners' claim that BNSF employees have the right to maintain BNSF's retained right-of-way *is* their CBAs. This, the court concluded, ended the inquiry. App. A at 16a. Petitioners' contention that federal courts could assert jurisdiction over this case because the actual controversy separating the parties involved non-CBA issues, was rejected. After observing that petitioners are correct in stating that the adjustment board "must determine whether BNSF actually transferred the maintenance obligations to New Mexico when BNSF transferred the physical railroad line" (App. A at 15a; footnote omitted), the court concluded that this inquiry concerning the application of the CBAs does not change the fact that the employees have "no claims that exist independent" of the CBAs. App. A at 16a. As the court explained (*Id.*; footnote omitted; emphasis added):

> Naturally, the Adjustment Board will look to *documents*, *cases*, *statutes*, and past practices outside the four corners to ["consider issues related to both the interpretation of the CBA and its application"] . . . . In the end, the Adjustment Board must still determine whether BNSF violated the CBA. And the Adjustment Board is perfectly capable of reviewing whether BNSF actually divested itself of maintenance obligations, or whether the line-sale transaction was a subterfuge to evade the requirements of the CBA.

REASONS FOR GRANTING THE WRIT

This case raises two questions of jurisdiction where guidance from this Court is urgently needed. The first

goes to the subject-matter jurisdiction of federal courts to enforce Section 2 Seventh of the Railway Labor Act, 45 U.S.C. § 152 Seventh, in controversies where Congress has also given RLA adjustment boards jurisdiction over aspects of the dispute, but where *only* courts have the competence to decide the underlying question of law that separates the parties, as well as jurisdiction to grant complete relief. The second question involves a State's sovereign immunity and the Eleventh Amendment to the Constitution of the United States; it asks whether federal courts have personal jurisdiction over a state officer to grant declaratory and prospective, minor and ancillary injunctive relief from that officer to enforce the RLA where the officer is not accused of violating the RLA. Both questions, petitioners submit, raise important questions of federal law which have not been settled by this Court, but have been decided by the lower courts in a way that conflicts with decisions by this Court.

I. THIS CASE RAISES IMPORTANT QUESTIONS CONCERNING FEDERAL COURT JURISDICTION TO ENSURE COMPLIANCE WITH CONGRESS' COMMAND THAT CARRIERS SUBJECT TO THE RAILWAY LABOR ACT COMPLY WITH THEIR COLLECTIVE-BARGAINING AGREEMENTS.

RLA Section 2 Seventh plays a crucial role in implementing Congress' plan to prevent labor disputes from causing interruptions to interstate commerce. As this Court explained in *Shore Line*, 396 U.S. at 156, Section 2 Seventh "operates to give legal and binding effect to collective agreements, and it lays down the requirement that collective agreements can be changed only by the statutory procedures." *Conrail* addressed the test to be used to determine whether a dispute over *changes* to collectively established employment terms should be *classified* as

being major or minor, thereby identifying which of the Act's two dispute resolution processes is applicable to the dispute. 491 U.S. at 305-07. But *Conrail* did not address the question that is presented here: whether the jurisdiction Congress gave adjustment boards over minor disputes is so pervasive that it divests federal courts of jurisdiction to enforce Section 2 Seventh, even in cases where adjustment boards lack a special competence over the actual issue in dispute, as well as jurisdiction to grant effective relief. The proper answer to the question presented here "turns on the importance of the duty in the scheme of the Act, the capacity of the courts to enforce it effectively, and the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory." *Chicago North Western Ry. v. UTU*, 402 U.S. at 578.

Lower federal courts, especially since *Conrail*, have not engaged in that inquiry in determining whether they must exercise jurisdiction over a Section 2 Seventh dispute. Rather, they typically view the determination of whether the dispute is major or minor as conclusively determining that they lack subject-matter jurisdiction over any aspect of the controversy. They reach this result, virtually by rote, because they assert that the RLA gives adjustment boards *exclusive* jurisdiction to resolve disputes growing out of the interpretation and application of existing agreements–*i.e.*, minor disputes. *E.g.*, *AFA v. Mesa Air Croup, Inc.*, 567 F3d 1043, 1050 (9th Cir. 2009) (Remanding with direction to dismiss for lack of subject matter jurisdiction); *IAM v. US Airways, Inc.*, 358 F3d 255, 256 (3rd Cir. 2004) ("For the reasons set forth below, we hold that the dispute is a minor one under the RLA, and therefore the district court lacked jurisdiction to issue the preliminary injunction"). This is the approach that the Tenth Circuit took in this case, looking at the case as presenting *solely* a classification question. App. A at 14a-18a.

This approach to federal court subject-matter jurisdiction, however, is not consistent with *Conrail*.[10] While this Court observed in *Conrail* that an RLA adjustment board "has exclusive jurisdiction over minor disputes" (491 U.S. at 304), it did not address the effect of that exclusivity on court jurisdiction to enforce RLA commands. Indeed, *Conrail*'s observation in footnote 5 (491 U.S. at 304-05) that there was an open question of whether "a status quo injunction based on a claim of irreparable injury would be appropriate" in a case raising a minor dispute (491 U.S. at 305), its recognition that in some minor-dispute cases the "delay inherent in permitting the Board to consider the matter in the first instance will lead to remedial difficulties" (491 U.S. at 310, n.8), and Justice White's concurrence that, if the adjustment board rules that the carrier was "wrong about its authority under the contract, the result will be that the company has sought a change in the contract without invoking the procedures applicable to major disputes" (491 U.S. at 320-21 (White, J., concurring)), all suggest that *Conrail* recognizes that adjustment board jurisdiction, while *exclusive* over contract-interpretation issues, may *not* be exclusive over matters that are *not* within the special competence of adjustment boards.

Viewing *Conrail* as *not* resolving this jurisdictional question is consistent with two other aspects of *Conrail*. First, *Conrail* did *not* address *Order of Railway Conductors v. Pitney*, where the Court considered the relationship between federal courts and RLA adjustment boards. 326 U.S. at 565-68. *Pitney* noted that Congress had assigned to the adjustment board–an "agency pecu-

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[10] It is also inconsistent with recent admonitions by the Court cautioning courts from making "drive-by jurisdictional rulings." *See, Reed Elsevier, Inc. v. Muchnick*, 559 U.S. ___, __ (2010) (No. 08-103, Slip Op. at 6).

liarly competent to handle the basic question here involved" (326 U.S. at 566)–the responsibility to *interpret* the CBAs. But, *Pitney* did not hold that the adjustment board's jurisdiction deprived the railroad reorganization court of jurisdiction to *enforce* rights as defined by the board. Instead, *Pitney* stated that the lower court should stay dismissal of the case "so as to give an opportunity for application to the Adjustment Board for an interpretation of the agreements. Any rights clearly revealed by such an interpretation might then, if the situation warrants, be protected in this proceeding." 326 U.S. at 568 (footnote omitted). Thus, *Pitney* shows that adjustment board jurisdiction does not divest the courts of jurisdiction over the dispute; rather, in the appropriate case, the two–courts and boards–should together enforce the agreement, the board by interpreting it and the court by enforcing the rights as defined by the board.

And second, *Conrail* defined the type of disputes it was addressing as those disputes that "may be conclusively resolved by *interpreting* the existing agreement." 491 U.S. at 305 (emphasis added). Here, the dispute over the enforcement of the CBAs may *not* be conclusively resolved by interpreting those agreements; indeed, the controversy separating the parties does not involve interpreting the collective agreements. Rather, as both lower courts acknowledged, labor's argument in this case is that BNSF retained its common carrier obligation under the ICA to maintain the right-of-way it reserved for itself, and, consequently, its contract assigning to NMDOT the responsibility to maintain that right of way, is nothing more than a contract with NMDOT to perform BNSF's work. App. A at 15a; App. B at 32a. Petitioners' arguments continue that their CBAs with BNSF require that this work be assigned to BNSF employees they represent. BNSF disputes this point, but its disagreement is that it no longer *controls* the maintenance work. *See*, App. A at

11a-14a. BNSF's arguments do not require an *interpretation* of the CBAs, for it is the ICA and the sale transaction which determines control over the common carrier maintenance obligation. App. A at 17a, *quoting* App. B at 32a ("If a board of adjustment examines the terms of the sale between BNSF and the State and finds that BNSF retained enough control over the right-of-way such that maintenance by the State would constitute illegal subcontracting, it can order BNSF to pay Plaintiff's claims until such time as Plaintiff is no longer being harmed by BNSF's contract violation"). While this type of dispute still implicates the jurisdiction Congress has given adjustment boards (*i.e.*, a dispute over the *application* of CBAs), it does not engage the boards' special competence–which is over CBA *interpretation*.

Moreover, the approach by the lower courts in this case and in the vast majority of cases in which the courts consider the *classification* dispute as being determinative of federal court subject-matter jurisdiction without any further inquiry, is inconsistent with the test enunciated in *Chicago & North Western* for determining "the priority of judicial enforcement" of RLA duties. This case is an excellent example of the need for courts to undertake the *Chicago & North Western* analysis before they abdicate their jurisdiction over Section 2 Seventh–a statutory command that, as *Shore Line* noted (396 U.S. at 156), is important in the design of the RLA. Courts have the capacity to enforce that command, and must do so in certain cases, such as the one at bar, if the statutory and contractual rights at issue are not to prove illusory.

Section 2 Seventh, by giving "legal and binding effect" to CBAs, prohibits employers subject to the RLA from doing what is all too typical today: deciding that it makes economic sense to breach a contract because the damages the party may have to pay for that breach are less

costly than complying with the agreement in the first place. Section 2 Seventh also enforces the design of the RLA whereby the "purposely long and drawn out" procedures of the Act's major dispute resolution process (*Shore Line*, 396 U.S. at 149 (citation omitted)) "frequently make it worth-while for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce." 396 U.S. at 150. However, by concluding, as the lower courts are doing, that they lack subject matter jurisdiction over the controversy whenever a complaint before them raises a dispute within the jurisdiction of an RLA adjustment board, the courts are making Section 2 Seventh a meaningless enactment.

Courts have the capacity to enforce Section 2 Seventh in cases, such as the one at bar, where the controlling question that must be decided to resolve the controversy involves issues of federal law and non-labor contracts over which adjustment boards have no special competence. Adjustment boards' expertise lies in construing CBAs and the "law of the shop" in the railroad and airline worlds. *See*, Lloyd K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 568-69 (1937) ("The railroad world is like a state within a state. . . . [It] has its own customs and its own vocabulary, and lives according to rules of its own making"). But adjustment boards have no expertise over the ICA, line-sale transactions and documents, or the interpretation of STB rulings. Indeed, many arbitrators are not lawyers.[11] Federal courts, on the other hand, have the capacity that the adjustment boards lack; courts have subject-matter jurisdiction over the ICA and

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[11] *Barrentine v. Arkansas Best Freight System, Inc.*, 450 U.S. 728, 743 n.21 (1981) ("We have noted that a 'substantial proportion of labor arbitrators are not lawyers'"); Sup. Ct. No. 07-581, *14 Penn*

jurisdiction to issue the declaratory judgment petitioners are seeking to resolve the dispute over the common carrier obligations BNSF retained over the right-of-way it reserved for itself and over which it is continuing to operate.

As *Conrail* recognized, "[i]n most cases where the [Adjustment] Board determines that the employer's conduct was not justified by the contract, the Board will be able to fashion an appropriate compensatory remedy which takes account of the delay." 491 U.S. at 310 n.8. In those cases, judicial enforcement of Section 2 Seventh will most likely not be necessary under the *Chicago & North Western* inquiry. But, as *Conrail* noted, there may be some circumstances "where the delay inherent in permitting the Board to consider the matter in the first instance will lead to remedial difficulties." *Id.* In those cases, judicial involvement is crucial if the contractual rights Section 2 Seventh is designed to protect not prove illusory.

This case is an excellent example of the need for judicial involvement, for both lower courts have implicitly recognized that the *only* relief an adjustment board may give petitioners is an order requiring "BNSF to pay Plaintiff's claims until such time as Plaintiff is no longer being harmed by BNSF's contract violation." App. A at 17a, *quoting* App. B at 32a. That will not cure the violation of the crafts' contractual rights, nor will it prevent the statutory violation that will continue so long as NMDOT maintains BNSF's right-of-way. Limiting petitioners' remedy to damages permits exactly what Section 2 Seventh was designed to prevent: breaching a contract because it is less costly to pay damages than negotiate a

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Plaza LLC v. Pyett, Amicus Curia Brief of National Academy of Arbitrators at 15 (in 1992, almost 40% of labor arbitrators were trained in industrial relations, not law).

change. The *only* remedy that will cure both the contractual and statutory violations is an injunction enjoining the last sale and requiring BNSF to reform the JUA.

But RLA adjustment boards cannot provide that relief. Since NMDOT is *not* a party to the dispute before the adjustment board, the board lacks jurisdiction over the State and may not restore to BNSF employees the right to maintain the track and signals on the right-of-way BNSF retained. Moreover, adjustment boards have limited remedial powers, stemming from the fact that such boards have no enforcement powers and whatever preclusive effect their awards have "is an issue for a later arbitrator to consider . . . ." *BMWE v. Burlington Northern R.R.*, 24 F3d 937, 940 (7th Cir. 1994); *Elkouri & Elkouri, How Arbitration Works* at1197 (6th Ed. BNA) (Alan M. Ruben, Editor) ("The judicial power to issue an injunction to preserve the status quo and prevent irreparable harm does not have an exact counterpart in the arbitration process, because the arbitrator is called on to remedy past contractual violations and lacks enforcement power"); Cir. App. at 255-57 (Detailing remedial limitations of RLA adjustment boards).

Federal courts, however, have the power to enforce Section 2 Seventh by issuing declaratory and injunctive relief. *Chicago & North Western Ry.*, 401 U.S. at 581. They also may assert jurisdiction over parties to the non-labor contracts that may need to be reformed to end the statutory violation.

The proper answer to the *Chicago & North Western* enforcement inquiry is important not only to this case, but also to other transactions throughout the country where railroads are entering into comparable line transfers with state agencies by which the governmental authority will provide commuter rail service on the same track over which the selling railroad retains an exclusive

easement to continue its rail freight service. *E.g.*, STB Finance Docket No. 35110, *Florida Department of Transportation–Acquisition Exemption–Certain Assets of CSX Transportation, Inc.* (Proposed sale of approximately 61.5 miles of track to Florida Department of Transportation while retaining easement to provide freight rail service). It is important to both the states and transferring railroads that they know *before* they enter into these transactions whether they are violating the RLA by assigning to the state the responsibility to maintain the right-of-way. This case will provide the method to obtain that answer and, thus, prevent unnecessary violations of contractual rights and federal law.

Additionally, examining the proper relationship between the jurisdiction Congress has given both courts and adjustment boards over disputes that may contain contract interpretation or application issues has ramifications beyond just this type of case. A decision here will effect other cases where labor has sought to invoke the courts' subject-matter jurisdiction to enforce RLA commands, but the courts have declined to exercise that jurisdiction because of the presence of a minor dispute. For example, if petitioners are correct in asserting that federal courts have subject-matter jurisdiction over Section 2 Seventh in the instant case, than that ruling would provide the jurisdictional foundation to resolve the conflict in the circuits over whether a federal court "can require an employer to maintain the status quo during the pendency of a minor dispute at the union's independent behest, where no strike injunction has been sought by the employer." *Conrail*, 491 U.S. at 304; *see also, Id.* at n.5. It would require a reexamination of the recent trend of some courts to view the presence of a contract-interpretation dispute as divesting the court of jurisdiction to enforce the Act's status quo obligation–a statutory obligation over which adjustment boards have no jurisdiction–where that obligation has been triggered. *E.g.*,

AFA v. Mesa Air Group, Inc., 567 F3d at 1049. And it would provide the jurisdictional foundation for courts to enforce commands of the RLA that an employer may violate through the exercise of its disciplinary or managerial powers. *E.g., AFA v. Horizon Air Industries, Inc.*, 280 F3d 901, 905 (9th Cir. 2002).

II. THIS CASE RAISES IMPORTANT QUESTIONS OF FEDERAL COURT JURISDICTION OVER A STATE OFFICER NOT ACCUSED OF VIOLATING FEDERAL LAW, BUT WHOSE PRESENCE IS REQUIRED TO ENFORCE FEDERAL LAW.

The second question presented by this Petition actually involves two issues: A preliminary one concerning federal court jurisdiction over a party whose presence is required under Rule 19(a), Fed. R. Civ. P., but against whom no cause of action is stated; and the articulation of that same issue, but with the added fact that the required party under Rule 19(a) is a state officer from whom declaratory and prospective injunctive relief is being sought under the *Ex parte Young*[12] doctrine to enforce federal law.

The first prong of Question 2 presents an issue which this Court has addressed in situations where the propriety of injunctive relief from a named defendant was at issue after a cause of action against that entity had been rejected. *E.g., General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375, 399 (1982); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 399-401 (1982); *IBT v. United States*, 431 U.S. 324, 356 (1977). In *General Building Contractors*, 458 U.S. at 399, the Court, after holding that the relief against the Contractors was not warranted in that case, added:

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[12] 209 U.S. 123 (1908).

> This is not to say that defendants in the position of petitioners might not, upon an appropriate evidentiary showing, be retained in the lawsuit and even subjected to such minor and ancillary provisions of an injunction order as the District Court might find necessary to grant complete relief to respondents from the discrimination they suffered at the hands of the Union.

This Court, however, has not addressed the situation presented here where the entity from whom relief is being sought is not accused of having violated any duty to plaintiffs.

That precise question, however, has been addressed by Circuit Courts discussing it in light of Rule 19(a)'s prescription that required parties be joined in the complaint. The circuits have reached conflicting statements of the governing rule. *Compare*, *Davenport v. IBT*, 166 F.3d 356, 366 (D.C. Cir. 1999) ("[W]hile Rule 19 provides for joinder of necessary parties, it does not create a cause of action against them"); *SEC v. Cherif*, 933 F.2d 403, 413 (7th Cir. 1991), *cert. denied*, 502 U.S. 1071 (1992) (Rule 19 "supplies a mechanism by which interested parties can be joined, but it presumes the pre-existence of subject matter jurisdiction over some cause of action alleged against the defendant"); *Vieux Carre Property Owners v. Brown*, 875 F.2d 453, 457 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990) ("[I]t is implicit in Rule 19(a) itself that before [a party] . . . will be joined as a defendant the plaintiff must have a cause of action against it"); *with*, *EEOC v. Peabody Western Coal Co.*, 400 F.3d 774, 781 (9th Cir. 2005), *cert. denied*, 546 U.S. 1150 (2006) ("[A] plaintiff's inability to state a cause of action against an absentee does not prevent the absentee's joinder under Rule 19"). As *Peabody* explained, however, those conflicting rulings can be reconciled by

acknowledging that *General Building Contractors*' dicta governs. 400 F3d at 782-83.

The second prong of the question addresses the fact that NMDOT's Secretary is a state officer and is entitled to invoke New Mexico's sovereignty. *Ex parte Young*, however, provides an exception to the claim of state sovereign immunity where the state official is sued in his official capacity for prospective injunctive relief to prevent ongoing violations of federal law. As this Court explained in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 645 (2002), *quoting*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part):

> In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."

Petitioners are seeking *only* prospective declaratory and injunctive relief from the Secretary in order to stop an ongoing violation of federal law: the violation of RLA Section 2 Seventh by NMDOT performing work that BNSF employees have the contractual right to perform. The Secretary is a required party to this suit under Rule 19(a) since the Secretary administers the contract petitioners assert violates federal law–the JUA and which they seek to have reformed. Whether, as the district court concluded, the fact that petitioners have not asserted a cause of action against the state means that the *Ex parte Young* doctrine is inapplicable, presents a question that is important to the application of that essential doctrine of Eleventh Amendment jurisprudence. It is also extremely important today because of the significant rise in what are known of "Public Private Partnerships" by which gov

ernmental agencies contract with private enterprises to perform public services, such as operating rail commuter services.

CONCLUSION

For the reasons set forth herein, the writ should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed March 2, 2010]

No. 08-2232

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
and
BROTHERHOOD OF RAILROAD SIGNALMEN,
Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY,
and
HON. GARY GIRON, in his capacity as Secretary-Designee,
New Mexico Department of Transportation,
Defendants-Appellees.

Appeal from the United States District Court for the District of New Mexico (D.C. No. CIV-06-245-JCH).

John O'B. Clarke, Jr., Highsaw, Mahoney & Clarke, P.C., Washington, District of Columbia, for Appellants BMWED and BRS.

David M. Pryor, BNSF Railway Company, Fort Worth, TX (Donald J. Munro, Goodwin Proctor LLP, Washington, District of Columbia, and John R. Conney and Earl E. DeBrine, Jr., Modrall Sperling Roehl Harris & Sisk, P.A., Albuquerque, NM, with him on the brief), for Appellee BNSF Railway Company, and Gail Gottlieb (Mark Chaiken and Kerry Kiernan with her on the brief), Sutin, Thayer & Browne, P.C., Albuquerque, NM, for Appellee Secretary-Designee Gary Giron.

Before TACHA, TYMKOVICH, and GORSUCH, Circuit Judges.

TYMKOVICH, Circuit Judge.

This case arises from Burlington Northern Santa Fe Railway Company's (BNSF) proposed sale of approximately 290 miles of BNSF's rail line to the New Mexico Department of Transportation. New Mexico sought to obtain the rail line as part of a plan to provide commuter rail service between Albuquerque, Santa Fe, and other points within the state. Under the terms of sale, New Mexico would obtain ownership of BNSF's rail lines, but reserve to BNSF a concurrent freight easement on the lines. New Mexico would also take over maintenance responsibilities of the right-of-way, an obligation previously belonging to BNSF.

In an effort to prevent New Mexico from assuming the maintenance responsibilities, two union organizations representing rail workers who had previously performed the maintenance work sued. They contended the assignment of the maintenance obligations (1) violated § 2 Seventh of the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*; and (2) breached the collective bargaining agreement between the workers and BNSF.

The district court dismissed the action, concluding it lacked jurisdiction over the claims. It held the RLA vests exclusive jurisdiction over the workers' claims in the National Railroad Adjustment Board, which has yet to review the case.

We agree with the district court. As explained below, we find the RLA reserves the dispute in this case to the Adjustment Board in the first instance, thus depriving the district court of jurisdiction. The workers' remedy lies in the administrative process before the Adjustment Board.

Accordingly, we AFFIRM the district court's dismissal of the complaint.

I. Background

The Transaction. As part of a project to expand public commuter rail service in central New Mexico, the New Mexico Department of Transportation entered into several agreements to purchase a portion of a rail line from BNSF. Under the proposed agreements, BNSF would transfer fee simple ownership in the physical assets of the rail lines to the state.

As part of the transaction, BNSF reserved an exclusive freight easement over the tracks. The easement, among other things, "reserve[d] for [BNSF] and its successors and assigns an exclusive easement for freight railroad purposes, including but not limited to, the construction, maintenance, repair, replacement and operation of freight rail and associated facilities." App. at 250. The parties' respective management obligations were set forth in a Joint Use Agreement (JUA). Specifically, the JUA provided that New Mexico "will be responsible for the management and maintenance of the Rail Corridor, subject to BNSF's Retained Freight Easement." App. at 225-26.[1]

Statutory Provisions. BNSF and New Mexico structured the transaction to ensure New Mexico would not acquire any obligation to provide freight common carrier service under the Interstate Commerce Act (ICA), 49 U.S.C. § 101 *et seq.* The ICA subjects common carriers to the jurisdiction of the Surface Transportation Board (STB), which imposes a comprehensive scheme of regulations on rail carriers.

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[1] The JUA also provided that New Mexico would charge BNSF for the rail company's proportionate share of maintenance costs for the portions of the rail line used by both parties. New Mexico would also inspect and maintain sidings, spurs, or industrial tracks not used for commuter service on the relevant segments. App. at 229.

As relevant here, the ICA provides that the sale of active rail lines is subject to the STB's prior approval. *See* 49 U.S.C. § 10901. In particular, the acquisition of an active rail line and the corresponding transfer of common carrier obligations ordinarily requires prior STB approval, even if the acquiring entity is not presently a common carrier. *See Dept. of Transp.-Acquisition and Operation Exemption Maine Cent. R.R. Co.*, 8 I.C.C. 2d 835, 836-37, (1991); *see also Cent. Puget Sound Reg'l Transit Auth.-Acquisition Exemption-BNSF Ry. Co.*, Fin. No. 34747, 2005 WL 3090144, at *2 (STB Nov. 18, 2005). The STB does not, however, have prior approval authority over a transaction where no common carrier rights or obligations are being transferred. *Maine*, 8 I.C.C. 2d at 836-37; *see also Port of Seattle Acquisition Exemption-Certain Assets of BNSF Ry. Co.*, Fin. No. 35128, 2008 WL 4718447, at *2 (STB Oct. 23, 2008).

Regulatory Proceedings. New Mexico initially filed notice of the proposed transaction with the STB. Later, the state sought dismissal of the agency proceedings since it would not become a common carrier as a result of the transaction and no agency action was therefore necessary. The STB agreed and dismissed the agency proceeding, declaring the "transaction does not require Board authorization" because "BNSF would not be transferring common carrier rights or obligations and . . . [New Mexico] would not hold itself out as a common carrier. . . . Under these circumstances, [New Mexico] would not become . . . subject to the Board's jurisdiction." App. at 151-52.

District Court Action. Once the STB stated it had no jurisdiction, the transaction was free to move forward. The rail workers then filed suit in federal district court, arguing that BNSF violated the RLA and the collective bargaining agreement between BNSF and the rail work-

ers (CBA) in assigning the maintenance responsibility to New Mexico. The rail workers contended BNSF did not in fact *transfer* the maintenance obligations to New Mexico; rather, the rail company simply *contracted* that work to the state. The rail workers argue that as long as BNSF has the obligation to provide maintenance to the rail line, it may not, under the CBA, assign or contract that work to anyone other than union employees. The workers maintained that by relinquishing the work to New Mexico, BNSF violated the terms of the CBA, as well as RLA provisions that prohibit unilateral changes in the pay rates, rules, or working conditions already set forth in collective bargaining agreements.[2] The rail workers sought (1) a declaratory judgment that BNSF, as the sole common carrier entity operating on the line, has a nondelegable obligation to maintain its right-of-way, (2) a declaratory judgment that BNSF violated the RLA by contracting the maintenance work to New Mexico, and (3) an injunction reforming the current transaction and preventing any future transactions violative of the RLA.

BNSF and New Mexico moved to dismiss the workers' complaint. The district court agreed, concluding it did not have jurisdiction and that under the RLA the National Railroad Adjustment Board governed the dispute. Accordingly, the district court dismissed the complaint with the understanding the dispute would be subject to binding arbitration proceedings before the Adjustment Board.

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[2] Section 2, Seventh of the RLA, 45 U.S.C. § 152, Seventh, provides, "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title." Thus, any violation of § 2, Seventh assumes a violation of an already existing agreement.

II. Analysis

On appeal, the rail workers argue the district court erred in concluding the Adjustment Board has exclusive jurisdiction over their claims. We review legal questions involving a district court's subject matter jurisdiction de novo. *See Bhd. of Maint. of Way Employes Div./IBT v. Union Pac. R.R. Co.*, 460 F.3d 1277, 1282 (10th Cir. 2006). We agree with the district court that it lacked subject matter jurisdiction because the RLA reserves cases such as this for binding arbitration before the Adjustment Board.

A. Legal Framework for Resolving RLA Disputes

The RLA provides a comprehensive and mandatory framework for resolving labor disputes under collective bargaining agreements. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994). It aims "to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce." *United Transp. Union v. Burlington N. Santa Fe R.R. Co.*, 528 F.3d 674, 677-678 (9th Cir. 2008) (quoting *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 148 (1969)). "To this end, the RLA establishes elaborate procedures for the negotiation, enforcement, and modification of collective bargaining agreements between railroad carriers and labor unions." *Id.* at 678 (quoting *Union R.R. Co. v. United Steelworkers of Am.*, 242 F.3d 458, 463 (3d Cir. 2001)).

The RLA sets forth two provisions relevant to the workers' claims. The first is 45 U.S.C. § 152, Seventh ("§ 2, Seventh"). Under this provision, no carrier "shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in § 6 of [the RLA]." Pursuant to § 6, 45 U.S.C. § 156, carriers must give

notice of major changes to pay, rules, or working conditions and, if arbitration is requested, maintain the status quo ante during the proceedings. The rail workers contend BNSF breached the "scope of work" provisions contained in its collective bargaining agreement and thereby violated § 2, Seventh by improperly contracting the maintenance responsibilities on the rail lines to New Mexico.

RLA disputes can be resolved either in federal court or in the Adjustment Board through binding arbitration. To determine which forum is appropriate in the first instance, the Supreme Court has created a two-part classification system: If a dispute is "major," it is not subject to Adjustment Board arbitration and should be resolved in federal court. If a dispute is "minor," binding arbitration before the Adjustment Board is mandatory. This appeal requires us to determine whether the disagreement between the rail workers and BNSF qualifies as a major or minor dispute.

B. Major and Minor Disputes

The RLA provides little guidance regarding how to determine whether a dispute is major or minor, but a series of well-established Supreme Court cases have laid out a framework for answering this question. *See Cons. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299 (1989) ("*Conrail*"); *Norris*, 512 U.S. at 252-57. "Major disputes relate to the formation of collective [bargaining] agreements." *Norris*, 512 U.S. at 252 (quotations omitted). These disputes relate to contract formation and arise

> where there is no such agreement or where it is sought to change the terms of one, and therefore *the issue is not whether an existing agreement controls the controversy.* They look to the acquisition of rights for the

> future, not to assertion of rights claimed to have vested in the past.

Conrail, 491 U.S. at 302 (citation omitted) (emphasis added). Thus, "major disputes seek to create contractual rights." *Id.*

In contrast, "minor disputes" seek to "enforce [contractual rights]." *Id.* They arise "out of the interpretation or application of" existing collective bargaining agreements. *Id.* at 303 (quoting 45 U.S.C. § 153 First (i)). Such disputes contemplate

> the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. *The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case.* In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

Id. (citation omitted) (emphasis added).

The Supreme Court has stressed that the relative importance of a case does not determine whether it qualifies as a major or minor dispute. *Conrail*, 491 U.S. at 305. Rather, we look to "whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action. The distinguishing feature of such a case is that the dispute may be conclusively resolved by interpreting the existing agreement." *Id.* To say "a minor dispute can be 'conclusively resolved' by interpreting the CBA is another way of saying that the dispute does not involve rights that

exist independent of the CBA." *Norris*, 512 U.S. at 265. The essence of the inquiry is whether the source of a party's asserted legal right is its collective bargaining agreement.

The Supreme Court has emphasized the primary importance of labor arbitration under the RLA. To that end, the default position for courts is to deem a dispute as minor if it even remotely touches on the terms of the relevant collective bargaining agreement. "[W]hen in doubt" the courts are to "construe disputes as minor." *Bhd. of Locomotive Eng'rs v. Atchison, Topeka & S.F. Ry. Co.*, 768 F.2d 914, 920 (7th Cir. 1985). Indeed, a party bears a "relatively light burden" in establishing exclusive jurisdiction in the Adjustment Board under the RLA. *Conrail*, 491 U.S. at 307.

To meet this burden, a party need only show that the contested action is "arguably justified" by the terms of the collective bargaining agreement. *Conrail*, 491 U.S. at 304-05, 307, 310. The Supreme Court declared,

> We hold that if an employer asserts a claim that the parties' agreement gives the employer the discretion to make a particular change in working conditions without prior negotiation, and if that claim is *arguably justified* by the terms of the parties' agreement (i.e., the claim is neither obviously insubstantial or frivolous, nor made in bad faith), the employer may make the change and the courts must defer to the arbitral jurisdiction of the Board.

Id. at 310 (emphasis added).

The Court has identified a number of factors to consider in determining whether either party's claim is "arguably justified." We look first and primarily, of course, to both the express and implied provisions of the collective bargaining agreement. *Conrail*, 491 U.S. at 320 (holding a dispute was minor because it was "arguably justified by the implied terms of its collective-bar-

gaining agreement"). Of equal importance is the parties' "practice, usage and custom" in negotiating and operating under applicable labor agreements. *Id.* at 311 ("[I]t is well established that the parties' 'practice, usage and custom' is of significance in interpreting their agreement.").

Other non-exclusive factors arising from cases applying *Conrail* include (1) arbitration decisions interpreting the bargaining agreement, (2) arbitration decisions interpreting similar language in other bargaining agreements, (3) the absence of a term prohibiting the carrier's action, (4) industry practice, (5) the intent behind and nature of the actions giving rise to the dispute, (6) any relevant amendments or side letters, and (7) unsuccessful attempts to "obtain through bargaining rights the carrier later contended it possessed." ABA, THE RAILWAY LABOR ACT, 389-93 (2d ed. 2005).

To some extent, courts acknowledge that the distinction between major and minor disputes can be a matter of artful pleading. *Conrail*, 491 U.S. at 305. "[T]here is a danger in leaving the characterization of the dispute solely in the hands of one party" when it "chooses whether to assert an existing contractual right to take or to resist the action in question." *Id.* Where the party "asserting a contractual basis for its claim is insincere in so doing, or its position [is] founded upon . . . insubstantial grounds, the result of honoring that party's characterization would be to undercut the prohibitions of § 2, Seventh, and § 6 of the Act against unilateral imposition of new contractual terms." *Id.* at 306 (quotations and citations omitted). In such a situation, "protection of the proper functioning of the statutory scheme requires the court to substitute its characterization for that of the claimant." *Id.*

In this case, there is no contention BNSF's defenses are frivolous or insincere, nor does the rail workers' pleading

or BNSF's response prevent us from discerning the essence of the dispute.

C. The Dispute Here Is Minor

With these principles in mind, we turn to the claims in this case. Under the lenient standards the Supreme Court has set forth, a dispute qualifies as minor when it is "arguably justified" by the express and implied terms of the collective bargaining agreement. As we explain below, the district court correctly determined the contested action in this case—BNSF's contracting maintenance responsibilities to New Mexico—was "arguably justified" under the CBA's scope of work provision.

First, the CBA supports BNSF's position. The CBA places no restrictions on the company's right to sell rail lines. Nor does the CBA explicitly establish that BNSF is obligated to continue using its employees to maintain lines BNSF has sold but over which it retains a freight easement and common carrier obligations. That the CBA's scope of work provisions obligate BNSF to assign work to its employees only if the company retains ownership of the property and control over the rail lines is arguable. "Contractual silence can be construed as a reservation to the employer of the right to act unilaterally." THE RAILWAY LABOR ACT, *supra* at 395. The tracks here were transferred in fee simple to New Mexico, and the JUA vested maintenance responsibility in the new owner.[3] Reviewing the CBA's reservation of work against these facts is a matter well suited for arbitration proceedings before the Adjustment Board.

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[3] In support of its flexibility under the CBA's scope of work provisions, BNSF also points out the CBA grants BNSF the unilateral right to abolish assignments and reduce the number of maintenance positions, so long as it provides requisite notice to the unions. This bolsters BNSF's claim that a reduction of maintenance obligations along the transferred track is not a violation of the CBA even if it retains residual rights under the easement.

Second, "practice, usage and custom," *Conrail*, 491 U.S. at 311, support the conclusion that BNSF's position is "arguably justified" by the CBA. *Cf. Air Line Pilots Ass'n, Int'l. v. Guilford Transp. Indus. Inc.*, 399 F.3d 89, 93 (1st Cir. 2005) ("A dispute is considered minor whenever the challenged conduct is 'arguably justified' either by the text and negotiating history of the CBA or by the past practices of the parties."); *Bhd. of Ry. & Steamship Clerks v. Atchison, Topeka & S.F. Ry. Co.*, 847 F.2d 403, 406 (7th Cir. 1988) (finding the railroad produced sufficient evidence of past practice to render the dispute minor). The record shows, for example, that BNSF has previously sold properties to third parties and ceded its maintenance obligations.[4] For example, in the mid-1990s, BNSF sold a right-of-way to public agencies in California, retained an exclusive freight easement over the lines, but was no longer responsible for maintaining the track. App. at 89. BNSF also points to transactions where it has retained a freight easement and common carrier obligations, without retaining any obligation to maintain the property. App. at 97-98.[5]

Third, several arbitration decisions involving leased or sold railroad properties support BNSF's position. App. at

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[4] Whether these previous transactions bear on the interpretation of the CBA is a question for the Adjustment Board. For our purposes, it is enough that they arguably justify classifying the dispute as arising out of the CBA.

[5] *See Cent. Puget Sound*, 2005 WL 3090144, at *1-2 (Nov. 18, 2005) (dismissing a notice of exemption because BNSF was not transferring common carrier obligations to Sound Transit when, along with the purchase and sale agreements, Sound Transit entered into a joint use agreement with BNSF under which BNSF retained the exclusive common carrier obligation to provide freight service to all existing and new customers and retained responsibility for dispatching the commuter operations on the lines, while Sound Transit became responsible for maintenance activities).

99-113. For example, BNSF points to an Adjustment Board decision in which the union claimed the carrier improperly subcontracted repair work after leasing facilities to a local industry. App. at 102. The Adjustment Board ruled in the carrier's favor, noting "the work was done at the direction of the Lessee who initiated and completed the work." *Id.* The Adjustment Board found the carrier was not aware of the work, and the Lessee was free to contract out maintenance to whomever it chose. *Id.* The union, the Adjustment Board concluded, failed to show that the work belonged to its members. *Id.* In another decision with similar facts, BNSF leased railroad-owned facilities to General Motors, which then contracted the maintenance and construction work out to a third party. App. at 104. The union argued the arrangement violated the collective bargaining agreement's subcontracting rules, but the Adjustment Board ruled that because the facility was no longer part of BNSF's operation, the maintenance work no longer belonged to union employees. *Id.* at 106. The facilities were under GM's control, and GM could contract the work as it saw fit. *Id.* Other decisions have similarly held that control is the central issue, and that when the carrier does not have control over the work performed, because it either leased or sold the property, the carrier no longer has the obligation to perform the maintenance and to use union employees. App. at 108-113.[6]

Finally, our conclusion accords with the decisions of other federal courts classifying disputes as minor under collective bargaining agreements. *See, e.g.*, *Sheet Metal Workers' Int'l. Ass'n v. Burlington N. R.R. Co.*, 893 F.2d 199, 203-205 (8th Cir. 1990) (whether the agreement per-

[6] The workers here, of course, will be free to argue before the Adjustment Board that the circumstances surrounding previous arbitration awards are distinct.

mitted the railroad to use nonunion employees of a wholly owned subsidiary to maintain locomotives used by the railroad to generate electricity could *arguably* be resolved by the scope clause of the agreement between the union and railroad, and, therefore, this was a minor dispute, even though the railroad's argument that the agreement permitted its action might be wrong); *Gen. Comm. of Adjustment, United Transp. Union, W. Md. Ry. Co. v. CSX R.R. Corp.*, 893 F.2d 584, 592 (3d Cir. 1990) (noting "several other courts have also categorized disputes involving rail line sales that caused the loss of union positions as minor under the RLA").

While none of the above factors is dispositive, they all arguably justify BNSF's explanation for its actions. The Adjustment Board will ultimately determine the strength of those explanations when it resolves whether or not BNSF breached the CBA.

* * *

In sum, the dispute here meets *Conrail's* "arguably justified" standard. Under the CBA and in light of the relevant factors that guide our inquiry, BNSF *arguably* had the authority to sell the rail lines at issue and to include in that sale the responsibility to maintain the lines—reducing union maintenance jobs—despite retaining a freight easement and common carrier obligations. BNSF's view of the CBA is sufficiently reasonable to meet its "relatively light burden" under *Conrail*, 491 U.S. at 307.

D. The Rail Workers' Arguments

The rail workers make two arguments to avoid this conclusion, but neither is persuasive.

The first argument is that the RLA requires a "two-step inquiry." Aplt. Br. at 33. According to the rail workers,

before we can decide whether BNSF breached the CBA, we must first resolve a threshold issue; namely, whether BNSF transferred the maintenance obligations to New Mexico when it sold the physical assets of the rail line. The rail workers claim the Adjustment Board will have to look at the line transfer transaction, the STB's decision regarding that transaction, and BNSF's obligations under the ICA. The rail workers argue the Adjustment Board has neither the jurisdiction nor the expertise to examine those matters, and thus this dispute cannot fall into the minor category. The rail workers aver that, with the additional threshold analysis, the case moves beyond merely interpreting the CBA and qualifies as a major dispute. We disagree.

First of all, the workers are correct that the Adjustment Board must determine whether BNSF actually transferred the maintenance obligations to New Mexico when BNSF transferred the physical railroad line.[7] The rail workers will be entitled to show that BNSF retained control over maintenance obligations on the freight easement. To resolve that question, the Adjustment Board will have to consider several issues, including an interpretation of the line-transfer documents and the JUA, as well as the rail workers' contention that BNSF retained all the rights and obligations of a freight common carrier under the ICA.

The rail workers argue that because the Adjustment Board cannot resolve their main contention—that BNSF

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[7] If BNSF did transfer the maintenance obligations, then the company no longer has any duty to perform the maintenance and thus no CBA obligation to use union employees. If, on the other hand, the rail workers show that BNSF retained the maintenance obligations, they contend the CBA obligates the company to use union employees for any maintenance work.

violated the CBA and thus the RLA—without first addressing these issues, the case qualifies as a major dispute. They reason that the Adjustment Board will not interpret the terms of the CBA, a necessity for a minor dispute, but will first answer the threshold question of whether the CBA even applies. Without citing any legal authority, the rail workers argue the Adjustment Board does not have jurisdiction to review the ICA, the STB's decision, or the sales documents in answering the threshold question, and that even if it did, it is not equipped to do so.

The rail workers' arguments fail because they cannot rebut the undisputed fact that the only source of their right to work is the CBA. *See Norris*, 512 U.S. at 265. They have no claims that exist independent of it. That the Adjustment Board will have to consider issues related to both the interpretation of the CBA and its application does not change this fact. Naturally, the Adjustment Board will look to documents, cases, statutes, and past practices outside the four corners of the document to do that. In the end, the Adjustment Board must still determine whether BNSF violated the CBA. And the Adjustment Board is perfectly capable of reviewing whether BNSF actually divested itself of maintenance obligations, or whether the line-sale transaction was a subterfuge to evade the requirements of the CBA.[8]

Because the Adjustment Board will be doing nothing

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[8] Our position is consistent with the Second Circuit in *Bhd. Locomotive Eng'rs Div. 269 v. Long Island R.R.*, 85 F.3d 35, 38 (2d Cir. 1996), where the court rejected a claim that the "conclusively resolved" language from *Conrail* or *Norris* created a "new, more demanding standard" for classifying minor disputes. Courts have been consistent in applying the "arguably justified" standard in categorizing disputes.

more than interpreting and applying the CBA to disputed facts, and because it has authority to do so, the district court properly characterized this case as a minor dispute. As the district court explained,

> Plaintiff alleges that its members have the contractual right to perform the maintenance work at issue. BNSF contends that Plaintiff's members have no right to perform work on track sold to a third party, and has plausible contractual justifications for its actions. This is the very essence of a minor dispute over which this Court has no jurisdiction. If a board of adjustment arbitrator examines the terms of the sale between BNSF and the State and finds that BNSF retained enough control over the right-of-way such that maintenance by the State would constitute illegal subcontracting, it can order BNSF to pay Plaintiff's claims until such time as Plaintiff is no longer being harmed by BNSF's contract violation. This would completely resolve Plaintiff's RLA claim.

App. at 340-41. This lucid reasoning explains the centrality of the CBA to this case.

We similarly dispose of the rail workers' second argument. They contend the dispute concerns the *application* of the CBA, and not its interpretation. The workers insist this creates a "hybrid" category that fits outside the minor classification. We again disagree.

As an initial matter, the RLA is clear no line exists between disputes that arise from the *application* of collective bargaining agreements and those that arise from their *interpretation*. In fact, the RLA applies plainly to collective bargaining agreement application claims as well as interpretation claims. *See, e.g.*, 45 U.S.C. § 153 First (i) (RLA applies to disputes arising from "the interpretation or application of agreements concerning rates

of pay, rules, or working conditions"); *Bhd. of Maint. of Way Employes Div./IBT v. Union Pac. R.R. Co.*, 460 F.3d 1277, 1282 (10th Cir. 2006) (explaining minor disputes "relate[ ] either to the meaning or proper application of a particular provision" of a collective bargaining agreement) (citation omitted). While major disputes seek to create contractual rights, minor disputes seek to enforce them. *Id.* At base, a minor dispute is one in which a party seeks to enforce preexisting contractual rights. *Conrail*, 491 U.S. at 302.

Even if the text of the RLA were not clear enough, *Conrail* and subsequent cases routinely apply the major/minor framework in these situations. The Supreme Court, in fact, rejected a variation of the rail workers' argument in *Conrail* and instead adopted an analysis that channels most cases into the minor category. The major/minor framework is drawn from the traditional "vocabulary of rail management and rail labor, as a shorthand method of describing two classes of controversy." *Id.* It bears repeating:

> [W]e shall not aggravate the already difficult task of distinguishing between major disputes and minor disputes by adding a third category of hybrid disputes. We hold that if an employer asserts a claim that the parties' agreement gives the employer the discretion to make a particular change in working conditions without prior negotiation, and if that claim is arguably justified by the terms of the parties' agreement (i.e., the claim is neither obviously insubstantial or frivolous, nor made in bad faith), the employer may make the change and the courts must defer to the arbitral jurisdiction of the Board.

Id. The Supreme Court's cautioning instruction in *Conrail* retains its vitality. We will not create a new category of dispute absent further guidance from the Court.

No matter the complexity with which the rail workers state their claim, this is fundamentally a case concerning the enforcement of *preexisting* contractual rights. The ultimate question is whether the alleged contracting of maintenance obligations to New Mexico violated the existing CBA, which requires union employees to perform BNSF's maintenance work. This case is squarely a minor dispute under the RLA.

In conclusion, this is not a case involving the unilateral creation of a new collective bargaining agreement or even new terms or rights under the existing CBA. Instead, it falls comfortably under *Conrail's* default category of minor disputes in which a party seeks to enforce a collective bargaining agreement.

III. Conclusion

Because the dispute is minor, it is subject to mandatory arbitration. The district court correctly determined arbitration is the proper venue for this dispute, and we therefore AFFIRM its order.

Given the above conclusion, we need not address the sovereign immunity issues concerning the Secretary. Appellants' Renewed Motion for an Injunction Pending Appeal is DENIED without prejudice.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Plaintiff,

v.

BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY,
and
HON. RHONDA G. FAUGHT, in her capacity as Secretary, New Mexico Department of Transportation,
Defendants.

No. CIV-06-245-JCH/LFG

Judith C. Herrera
United States District Judge.

[Filed September 17, 2008]

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Plaintiff's *Motion to Alter or Amend the Judgment* [Doc. no. 83]. The Court held a hearing on this motion August 5, 2008. In its motion, Plaintiff raises four points: 1) the Court should allow Plaintiff to amend the complaint to add the Brotherhood of Railway Signalmen ("BRS") as a plaintiff; 2) the Court should vacate its order dismissing Secretary Faught as a defendant; 3) the Court erred in finding the dispute to be "minor" and dismissing the complaint for lack of Subject Matter Jurisdiction; and 4) if the Court does not change its ruling finding the dispute to be a

"minor" one, it should grant Plaintiff's alternative request for a preliminary injunction. Having considered the motion, briefs, relevant law, supplemental declarations, and arguments of the parties at the hearing, and being otherwise fully informed, the Court finds that Plaintiff's motion to amend the complaint to add BRS as a plaintiff should be GRANTED, and all other relief sought in its motion should be DENIED.

BACKGROUND

This case presents a labor dispute over the right to perform railway maintenance work over certain rail-road tracks in New Mexico. It arises from a series of agreements between the State of New Mexico ("the State") and BNSF Railway Company ("BNSF"). These include a series of Purchase and Sale Agreements ("PSAs"), each covering a segment of railroad track between Belen, New Mexico and Trinidad, Colorado, along with a Joint Use Agreement ("JUA") regarding the BNSF's and the State's respective rights to the tracks. In those agreements, BNSF consents to sell to the State approximately 280 miles of rail line from Belen to the New Mexico-Colorado border. Prior to the sale, BNSF provided rail freight common carriage over the subject rail line, and it intended to continue to do so after each transfer. Furthermore, after each transfer, BNSF retained "an exclusive easement for freight railroad purposes, including, but not limited to, the construction, maintenance, repair, replacement and operation of freight rail and associated facilities. . . ." *See Joint Stipulated Submission of Record* [Doc. 14], Tab 14 at ¶ 1.

The State submitted papers to the Surface Transportation Board ("STB")[1] stating that it planned to acquire

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[1] The STB, which is the successor to the Interstate Commerce Commission, has responsibility for enforcing Congress' railroad policies and has authority over sales of rail lines.

the line for the purpose of providing commuter rail operations, but that it would not acquire the right or obligation to conduct freight rail service of any kind over the line. Relying on that statement, the STB concluded that it had no jurisdiction over the transfers because "Board authorization is not required . . . when the common carrier rights and obligations that attach to the lines will not be transferred" and, therefore, the State "would not become a rail carrier subject to the Board's jurisdiction as a result of the transaction." STB Finance Docket No. 34793 at 2-3, attached as Appendix A to *Opposition of Plaintif to Motion by Defendant BNSF to Dismiss Complaint for Lack of Jurisdiction* [Doc. 25].

Plaintiff, Brotherhood of Maintenance of Way Employes Division[2] ("BMWED"), argues that as the only provider of freight service on the rail lines, BNSF has a nondelegable obligation under the Interstate Commerce Act ("ICA") to maintain the tracks over which it is required to provide rail freight transportation. Since BNSF retains that nondelegable obligation, alleges Plaintiff, BNSF may not contract with the State to have the State maintain the rail lines, because both the Railway Labor Act ("RLA") and the collective bargaining agreement between BNSF and the Plaintiff require that BMWED-represented employees perform the maintenance work. Plaintiff also alleges that its collective bargaining agreement with BNSF requires BNSF to use employees represented by BMWED to perform work that has customarily and historically been performed by

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[2]The parties and the Court have, throughout this case, utilized two different spellings of BMWED's full name, occasionally using "Employees" rather than "Employes." BMWED's web site, located at http:// www.bmwed.org, confirms that "Employes" is the correct spelling of the name.

Maintenance of Way employees and that this work includes maintenance of way work on the rail lines being transferred to the State. Thus, Plaintiff argues, BNSF may not contract with the State through their JUA to have NMDOT maintain those lines.

Plaintiff sought a declaratory judgment on two issues. First, that BNSF, as the sole entity with the right and obligation under the ICA to provide common carrier rail freight operations over the subject rail lines, has a nondelegable obligation under the ICA to maintain its right of way. Second, that BNSF has violated the RLA by contracting with the State to perform the maintenance of way work. It also sought an order enjoining BNSF and Secretary Faught, and all persons acting in concert with them, from consummating any further line transfers until either BNSF obtains relief under the RLA from its alleged obligation to have Union employees perform the maintenance work, or the State and BNSF "reform" their agreement such that BNSF honors its alleged obligations to the BMWED employees. In addition, Plaintiff sought a permanent injunction requiring the State and BNSF to reform their JUA so that it is consistent with the collective bargaining agreement between BNSF and Plaintiff.

On May 19, 2006, Defendant Faught filed a motion to dismiss based on Eleventh Amendment sovereign immunity [Doc. 8] and a second motion to dismiss based on lack of subject matter jurisdiction and failure to state a claim [Doc. 10]. That same day, Defendant BNSF filed a motion to dismiss for lack of subject matter jurisdiction [Doc. 12]. On September 11, 2007, the Court held a hearing on these motions at which it concluded that all three motions should be granted. The Court's reasoning was explained in its oral ruling at the hearing, and reflected in its *Order of Dismissal*, filed September 13, 2007 [Doc. 82].

In addition to Plaintiff's *Motion to Alter or Amend the Judgment*, Plaintiff also filed two unopposed motions for leave to file supplemental declarations [Doc. 84, filed October 12, 2007, and Doc. 96, filed January 31, 2008].[3] Plaintiff also filed a *Notice of Supplemental Authority* [Doc. 102, filed July 23, 2008], which it contended presented relevant cases decided after the Court's initial decision. On August 5, 2008, the Court held a hearing on Plaintiff's *Motion to Alter or Amend the Judgment*, during which it heard arguments from Plaintiff and Defendant BNSF. The arguments on Plaintiff's motion included issues raised by Plaintiff's supplemental filings. The Court did not revisit its decision dismissing Secretary Faught at the hearing.

DISCUSSION

1) Adding BRS as a Plaintiff

In granting the Defendants' motions to dismiss the complaint, the Court denied all remaining pending motions as moot. *See Order of Dismissal*, Doc. 82 at 3. One of the remaining motions still pending at that time was Plaintiff's *Motion to Amend Complaint* [Doc. 64, filed November 15, 2006]. Through that motion, Plaintiff sought to add the Brotherhood of Railway Signalmen ("BRS") as a plaintiff to all but Count IV of the complaint. In its *Motion to Alter or Amend the Judgment*, Plaintiff

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[3] Although Defendant BNSF did not object to Plaintiff's first *Motion for Leave to File Supplemental Declarations* [Doc. 84], it did dispute the arguments contained in Plaintiff's motion and Plaintiff's characterization of what the supplemental declarations showed. *See Defendant's Response to Plaintiff's Motion for Leave to File Supplemental Declarations* [Doc. 89]. Similarly, Defendants had no objection to Plaintiff's motion to file a second group of supplemental declarations, but Defendant BNSF did note its objection to Plaintiff's characterization of what the supplemental declarations showed.

asks the Court to vacate its denial of the motion to add BRS as a plaintiff. Plaintiff argues that, despite the Court's dismissal of the complaint, the motion to amend is not moot because BRS's status as a party entitled to appeal is still relevant.

Neither Defendant opposes the addition of BRS as a plaintiff, and the Court agrees with Plaintiff that the necessity of clarifying BRS's status as a plaintiff for appeals purposes prevents Plaintiff's *Motion to Amend Complaint* from being moot, even if the Court maintains its dismissal of the complaint. Accordingly, Plaintiff's *Motion to Amend Complaint* is hereby GRANTED.

2) Dismissal of the Complaint Against Secretary Faught

In its *Order of Dismissal*, the Court held that Plaintiff's complaint failed to state a claim against Secretary Faught because Plaintiff failed to allege that she had violated any legal duty to Plaintiff. In fact, Plaintiff admitted as much during the hearing on the motions to dismiss. Plaintiff's argument essentially stated that Defendant Faught might violate the Railway Labor Act if, at some point in the future, the Joint Use Agreement between BNSF and the State of New Mexico were ordered to be reformed and the Secretary refused to comply with this order. The Court found this assertion of a future possible violation of federal law to be speculative and premature, and to fail to state a claim upon which relief could be granted.

The Court further held that Secretary Faught, as a state officer, has sovereign immunity against Plaintiff's claims. The Court disagreed with Plaintiff's argument that the exception to Eleventh Amendment immunity outlined in *Ex Parte Young*, 209 U.S. 123 (1908) applies in this case. Plaintiff conceded that Secretary Faught had not violated the constitution or federal law, but instead based its claims against her on the allegation that

she might violate the Railway Labor Act at some point in the future.

Three grounds warrant granting a motion under Fed.R.Civ.P. 59(e): 1) an intervening change in controlling law; 2) new evidence previously unavailable; or 3) the need to prevent clear error or manifest injustice. *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). With respect to the issue of the Court's dismissal of Secretary Faught from this case, Plaintiff has not attempted to rely on either of the first two grounds, instead alleging that the Court "misapprehended . . . the controlling law." Doc. 93 at 3 (quoting *Servants of the Paraclete*, 204 F.3d at 1012).

The Court carefully considered both the extensive briefing on this issue and the parties' oral arguments prior to issuing its previous ruling. Plaintiff's current motion does not set out any law or fact not previously considered by the Court, but instead simply attempts to reargue a position that the Court has already rejected. Plaintiff's motion on this issue is therefore denied.

3) Dismissal for Lack of Subject Matter Jurisdiction

The primary purpose behind the RLA is "to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994). In order to accomplish this purpose, the RLA establishes a mandatory arbitration system for settling two classes of labor disputes: those concerning "rates of pay, rules, or working conditions," which are deemed "major" disputes; and those "growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions," which are deemed "minor" disputes. 45 U.S.C. § 151a. Thus, major disputes relate to " 'the formation of collec-

tive [bargaining] agreements or efforts to secure them.' " *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 302 (1989) ("*Conrail*")(quoting *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945)). Minor disputes, on the other hand, involve "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 33 (1957). Simply put, "major disputes seek to create contractual rights, minor disputes to enforce them." *Conrail*, 491 U.S. at 302.

The statutory framework constructed to resolve disputes differs substantially depending on whether the dispute is classified as major or minor. In the case of a major dispute, the parties are required to "maintain the status quo" until they complete a "lengthy process of bargaining and mediation." *Id.* District courts have subject matter jurisdiction to enter an injunction to preserve the status quo pending completion of the required dispute resolution procedures without the customary showing of irreparable harm. *Id.* at 303. If the bargaining and mediation process fails, and the major dispute remains unsettled, the parties may resort to using economic force. *Id.* In contrast, a district court lacks subject matter jurisdiction over minor disputes, which are instead subject to the exclusive jurisdiction of the National Railroad Adjustment Board or an alternative adjustment board established by the parties which then conducts compulsory and binding arbitration. *Id.* at 303-304.

Thus, in a situation involving a disagreement between a railroad and union, the court must make a threshold determination of whether the nature of the dispute is major or minor in order to determine whether it has jurisdiction to adjudicate the underlying merits of the claim. In *Conrail*, the Supreme Court outlined the proper

method to evaluate the issue, holding that the dispute is minor if the contested action "is arguably justified by the terms of the parties' collective bargaining agreement." *Id.* at 307. In contrast, the dispute should be classified as major only if "the employer's claims are frivolous or obviously insubstantial." *Id.* The *Conrail* Court classified the burden that carriers bear in establishing exclusive arbitral jurisdiction under the RLA as "relatively light," *Id.*, and the Tenth Circuit characterized the test as being "slanted toward finding a dispute minor." *Brotherhood of Maintenance of Way Employes v. Union Pac. R.R. Co.*, No. 00-1105, 2000 U.S.App. LEXIS 33454 at *3 (10th Cir. Dec. 21, 2000). Indeed, a court could deem a carrier's contract interpretation to be questionable, improbable, or even likely to be proven incorrect,[4] and still find that the dispute is minor as long as the employer's contractual justification for its action is plausible. *See Sheet Metal Worker's Int'l Ass'n v. Burlington N. R.R. Co.*, 893 F.2d 199, 205 (8th Cir. 1990); *Nat'l Ry. Labor Conf. v. Int'l Ass'n of Machinists & Aerospace Workers*, 830 F.2d 741, 748 (7th Cir. 1987).

With this standard in mind, at the September 11, 2007 hearing on the Defendants' motions to dismiss, the Court held that it lacked subject matter jurisdiction over Plaintiff's action because this constitutes a minor dispute. It found that Defendant BNSF's actions in selling portions of its track to the State of New Mexico and transferring the maintenance of the track to the State were arguably justified under the terms of the CBA. The Court noted that numerous arbitration awards stand for the principle that when a carrier no longer owns the property to be maintained, maintenance and improvement work is not within the scope of rules governing the relationship

[4] By citing this standard, the Court does not mean to imply that it deems Defendant's interpretation to be questionable or improbable.

between the union and the carrier, and it referenced arbitration awards in favor of carriers who delegated maintenance and repair work to lessees or other third parties. It also noted past practice in which BNSF sold a fee interest in property, retained operating rights over that land, and delegated maintenance responsibility to the purchaser. It noted that Plaintiff itself filed this action under Section 3 of the RLA, which is the procedure for resolving minor disputes. Finally, the Court noted that nothing in the CBA prevents BNSF from selling its lines or abolishing maintenance of way positions.

Following the Court's dismissal of Plaintiff's complaint, Plaintiff filed two unopposed motions for leave to file supplemental declarations in addition to its motion to alter or amend the judgment. Plaintiff argued that the supplemental declarations demonstrated that an RLA adjustment board would not have sufficient jurisdiction to consider all of the elements necessary to resolve Plaintiff's complaint, and that Defendant BNSF knew that a board would lack such jurisdiction at the time it argued to the Court that an RLA board had exclusive jurisdiction.

From the inception of the case, Plaintiff has argued that the dispute between it and BNSF does not concern the proper interpretation of the CBA, but rather whether BNSF retained the obligation to perform maintenance even after its sale of track to the State of New Mexico, in which case BNSF could not delegate the work to anyone other than Plaintiff to perform. Plaintiff contends that this question cannot be resolved without interpreting the Interstate Commerce Act ("ICA"), the decision of the STB dismissing the Notice of Exemption that the State of New Mexico Department of Transportation had filed, and the sale documents.

The supplemental declarations filed by Plaintiff authenticated letters sent by BNSF to Plaintiff BMWED and pro-

posed Plaintiff BRS. The supplemental declarations attached the referenced letters, which were received by counsel for BMWED and BRS after Plaintiff filed its motion to alter or amend the judgment. The letters set forth BNSF's position that Plaintiff's contention that BNSF retained the obligation under the ICA to maintain the right-of-way it reserved for itself after the sale to the State is outside of the jurisdiction of an RLA adjustment board. For example, in a September 27, 2007 letter to proposed Plaintiff BRS, BNSF's General Director of Labor Relations stated:

> [BRS's] claims are based on an argument of law, rather than of labor contract. You are arguing that [BNSF] may not, as a matter of law, divide its "common carrier obligations" from its sale to the State of New Mexico. All these labor claims are really based on notions that require interpretation of the Interstate Commerce Act (particularly 45 U.S.C. § 11101), Surface Transportation Board (STB) jurisdiction and powers, or both. Those are clearly functions outside of the jurisdiction of any board of adjustment, and BNSF does **not** consent to confer any such jurisdiction.

Doc. 84, Kidder Ex. 1 at 1-2 (emphasis in original).

One of the hallmarks of a minor dispute is that it "may be conclusively resolved by interpreting the existing agreement." *Conrail*, 491 U.S. at 305. In submitting its supplemental declarations and attached letters, Plaintiff argued that BNSF's position confirmed that this is not a minor dispute because it cannot be conclusively resolved by a board of adjustment, since the adjustment board does not have jurisdiction to interpret the ICA as it must do to determine whether BNSF retained the obligation to maintain the right-of-way it reserved to itself. Plaintiff contends that BNSF took inconsistent positions, initially arguing that Plaintiff has no remedy in federal court

because this is a minor dispute, but then arguing after the Court granted the motion to dismiss that there is no remedy in front of an RLA arbitrator either. Plaintiff alleges that BNSF's letters demonstrate that it is merely playing a "shell game" with the Court, and that BNSF intends to capitalize on the limited jurisdiction of RLA adjustment boards to prevent Plaintiff's claim from being properly heard in any forum. Doc. 94 at 3.

Throughout this litigation, Defendant BNSF has maintained that Plaintiff's claim is properly seen as alleging a violation of subcontracting or scope rules (defining which work a union owns), as defined by the CBA. It has argued that, in order to prevail, Plaintiff must demonstrate that the terms of the sale between BNSF and the State resulted in BNSF retaining control of the maintenance requirement, and that turning over maintenance to the State therefore violated the CBA. At no point had BNSF suggested that interpretation of the ICA or STB authority was necessary to resolve this dispute. However, because BNSF's letters refusing to expand the adjustment board's jurisdiction to consider non labor legal issues appeared to be the first instance of BNSF explicitly discussing its view of the scope of the adjustment board's jurisdiction, the Court held a hearing to ensure that BNSF was not altering its position in an attempt to take unfair advantage of the Court's earlier ruling.

The arguments of the parties at the hearing and its review of all of the parties' earlier submissions convince the Court that BNSF did not change its position after the Court's earlier ruling because BNSF had never stated nor implied that it would expand the scope of the adjustment board's jurisdiction. Therefore, the Court has no need to alter its earlier determination that this is a minor dispute properly in the exclusive jurisdiction of an RLA board of

adjustment or that the RLA board of adjustment can conclusively resolve this dispute.

Plaintiff alleges that its members have the contractual right to perform the maintenance work at issue. BNSF contends that Plaintiff's members have no right to perform work on track sold to a third party, and has plausible contractual justifications for its actions. This is the very essence of a minor dispute over which this Court has no jurisdiction. If a board of adjustment arbitrator examines the terms of the sale between BNSF and the State and finds that BNSF retained enough control over the right-of-way such that maintenance by the State would constitute illegal subcontracting, it can order BNSF to pay Plaintiff's claims until such time as Plaintiff is no longer being harmed by BNSF's contract violation. This would completely resolve Plaintiff's RLA claim. Plaintiff's motion on this issue is therefore denied.

4) Plaintiff's Alternative Motion for Preliminary Injunction

Plaintiff contends that the Court erred when it dismissed this case for lack of subject matter jurisdiction without addressing the alternative claim in its complaint. Plaintiff's alternative claim sought, in the event the Court characterized this as a minor dispute, an injunction enjoining any further rail line sales until an adjustment board resolved the contract claims. Complaint, Doc. 1 at ¶ 39. The alternative claim also asked the Court to retain jurisdiction over the case so that, if the adjustment board ruled in Plaintiff's favor, the Court could require BNSF and the State to reform the Joint Use Agreement and restore maintenance work to BMWED represented employees. *Id.*

Perhaps the Court could have been more clear when dismissing the case that its characterization of the dispute as minor also precluded the injunctive relief sought

by Plaintiff, but the fact remains that the injunctive relief Plaintiff seeks, prior to a decision by the adjustment board, is inappropriate.

Several Circuits have stated flatly that injunctive relief is inappropriate in a minor case because the statutorily established grievance procedures are mandatory and exclusive. *See, e.g., Int'l Ass'n of Machinists & Aerospace Workers v. Eastern Air Lines, Inc.*, 826 F.2d 1141, 1151 (1st Cir. 1987) (holding that district court committed reversible error in issuing injunctive relief to maintain status quo in a minor dispute pending resolution of the merits by an arbitration board and listing holdings from other circuits in accord). The Tenth Circuit has not ruled on the ability of courts to issue the type of injunctive relief Plaintiff seeks. The case Plaintiff cites, *BMWED v. Union Pac. R.R. Co.*, 460 F.3d 1277 (10th Cir. 2006) offers no help. The *Union Pacific* case held that a district court had jurisdiction to enjoin BMWED from striking during the resolution of the parties' minor dispute, and to place conditions on the granting of that injunctive relief, but not to condition the anti-strike injunction on the parties' minor dispute being remanded to a particular adjustment board. That the district court had jurisdiction to enjoin a strike arising out of a minor dispute flows directly from *Conrail*, 491 U.S. at 304. Although *Conrail* explicitly found that district courts may enjoin suits arising out of minor disputes, it declined to resolve the question of whether a federal court had the authority to issue a status quo injunction during the pendency of a minor dispute at a union's behest, where an employer had not sought a strike injunction. *Id.*, n. 5. Thus, the court's holding in *Union Pacific* does not extend beyond the context of an anti-strike injunction, which is not present in this case.

Even those courts that have recognized the ability to issue an injunction in a minor dispute prior to an arbitra

tor's decision have done so only in very limited circumstances. The Second Circuit, while acknowledging a conflict with numerous other circuits, has stated that issuing an injunction to preserve the status quo pending resolution of a minor dispute "is appropriate . . . in those instances when it appears that its absence would prevent the Adjustment Board from giving a significant remedy to the side that prevails before the Board." *CSX Transp., Inc. v. United Transp. Union*, 879 F.2d 990, 1004 n. 10 (2d Cir. 1989) (citation omitted). Similarly, the Third Circuit noted that "[t]here are limited circumstances in which a court may issue an injunction in minor disputes to preserve the status quo, when such action is necessary to keep pending arbitration proceedings from becoming meaningless." *Gen. Comm. of Adjustment, United Transp. Union v. CSX R.R. Corp.*, 983 F.2d 584, 593 n. 11 (3d Cir. 1990).[5]

Although the Court does not consider that the narrow exception discussed by the Second and Third Circuits above is the law in the Tenth Circuit, even if it were, Plaintiff has not met the exception. Plaintiff has not demonstrated that its remedy if it prevails in front of the Board will be meaningless without an injunction. An arbitrator could order BNSF to pay Plaintiff's damage claims if it found that BNSF's actions constituted subcontracting in violation of the CBA. In the event that Plaintiff is dissatisfied with the Board's remedy, it may, at that time, file

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[5] The body of the Third Circuit's opinion makes clear just how narrow this exception is, when it says "we see no merit in the Union's argument that the Supreme Court's opinion in *Conrail* gives the district court authority it should exercise to maintain jurisdiction in a minor dispute by staying its proceedings pending arbitration by the Board. The Court in *Conrail* adhered to the established major/minor categorization scheme and did not suggest that district courts should retain jurisdiction over disputes referred to the Board for arbitration." 983 F.2d at 593.

a petition for review with a district court pursuant to 45 U.S.C. § 153, First (q). In the event that Plaintiff prevails before the Board and BNSF refuses to follow the Board's ruling, Plaintiff's remedy is to file suit to enforce the ruling at that time pursuant to 45 U.S.C. § 153, First (p). An injunction in this minor dispute to maintain the status quo or to maintain jurisdiction to enforce a hypothetical award is inappropriate, and Plaintiff's alternative claim is therefore denied.

CONCLUSION

IT IS THEREFORE ORDERED that, with respect to Plaintiff's *Motion to Alter or Amend the Judgment* [Doc. no. 83] is granted in part and denied in part, in that Plaintiff's *Motion to Amend Complaint* [Doc. No 64] to add the Brotherhood of Railway Signalmen as a plaintiff is GRANTED; all other relief sought in Plaintiff's *Motion to Alter or Amend the Judgment* [Doc. no. 83] is DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Plaintiff,

v.

BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY,
and
HON. RHONDA G. FAUGHT, in her capacity as Secretary, New Mexico Department of Transportation,
Defendants.

No. CIV 06 245 JCH/LFG

Judith C. Herrera
United States District Judge.

[Filed September 13, 2007]

ORDER OF DISMISSAL

This matter came before the Court on three motions to dismiss for lack of jurisdiction: Defendant Faught's motion to dismiss based on Eleventh Amendment sovereign immunity [Doc. No. 8], Defendant Faught's motion to dismiss based on lack of subject matter jurisdiction and failure to state a claim [Doc. No. 10], and Defendant BNSF's motion to dismiss for lack of jurisdiction [Doc. No. 12]. On September 11, 2007, the Court held a hearing on these motions, at which all parties were represented by counsel. After considering the allegations of the complaint, the law, the briefs, and the oral arguments of counsel, the Court concluded that all three motions should be granted.

As stated more fully on the record at the hearing, the Court concludes that Plaintiff's complaint fails to state a claim against Defendant Faught because Plaintiff fails to allege that she has violated any legal duty to Plaintiff. Plaintiff admits as much. Instead, Plaintiff argues that, after several contingencies occur, Faught might in the future violate the Railway Labor Act. This [2] assertion by Plaintiff against Faught is speculative and premature, and fails to state a claim upon which relief may be granted.

In addition, the Court concludes that Faught, as a state officer, has sovereign immunity against Plaintiff's claims. Though Plaintiff argued that the exception to Eleventh Amendment immunity outlined in *Ex Parte Young*, 209 U.S. 123 (1908), applies to this case, the Court disagrees. In *Ex parte Young*, the Supreme Court held that the Eleventh Amendment generally will not operate to bar lawsuits in federal court so long as they (i) seek only declaratory and injunctive relief rather than monetary damages for alleged violations of federal law, and (ii) are aimed against state officers who violate federal law while acting in their official capacities, rather than against the State itself. (emphasis added). Again, Plaintiff concedes that Faught is not violating the constitution or any federal law, but bases its claims against her on the allegation that she might violate the Railway Labor Act at some future time. Plaintiff points to no federal appellate opinions upholding the application of *Ex Parte Young* in such circumstances. Further, the Court finds that the forum selection clause in the contract between the State of New Mexico and BNSF does not waive the State's sovereign immunity as to claims brought against it by Plaintiff, a non-party who is not a beneficiary of the contract. Accordingly, the Court concludes that Faught's motion to dismiss on sovereign immunity grounds should be granted as well.

Finally, the Court grants Defendant BNSF's motion to dismiss for lack of jurisdiction, finding that, under *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n (Conrail)*, 491 U.S. 299 (1989), this is a minor dispute involving the interpretation or application of the collective bargaining agreement between Plaintiff and BNSF. "Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is *arguably justified* by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employers claims are [3] *frivolous or obviously insubstantial*, the dispute is major." *Conrail*, 491 U.S. at 307 (emphasis added). As discussed in more detail at the hearing, the Court finds that BNSF's action is arguably justified by the collective bargaining agreement, and therefore is a minor dispute belonging to the exclusive jurisdiction of the appropriate administrative board for final and binding arbitration. Accordingly, Plaintiff's claims against BNSF will be dismissed.

IT IS THEREFORE ORDERED that Defendant Faught's motion to dismiss based on Eleventh Amendment sovereign immunity [Doc. No. 8], Defendant Faught's motion to dismiss based on lack of subject matter jurisdiction and failure to state a claim [Doc. No. 10], and Defendant BNSF's motion to dismiss for lack of jurisdiction [Doc. No. 12] are all **GRANTED**, and all of Plaintiff's claims are hereby **DISMISSED**. All remaining pending motions [Doc. Nos. 41, 45, 51, 59, 64, and 65] are **DENIED AS MOOT**.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Plaintiff,

v.

BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY,
and
HON. RHONDA G. FAUGHT, in her capacity as Secretary,
New Mexico Department of Transportation,
Defendants.

No. CIV-06-245 JCH/LFG

Before Honorable Judith C. Herrera
United States District Judge.

TRANSCRIPT OF PROCEEDINGS

MOTIONS HEARING

September 11, 2007

[3] (Court in session at 1:30 p.m.)

THE COURT: Please be seated. Good afternoon. We're on the record in Brotherhood of Maintenance of Way Employees Division IBT vs BNSF Railway Company and the Honorable Rhonda G. Faught. And that is Civil No. 06-245.

We are here this afternoon on three motions. First, Defendant Faught's motion to dismiss on the basis of sovereign immunity, which is Pleading No. 8.

[4] The second motion is Defendant Faught's motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim, which 4 is Document No. 10.

And the third motion is Defendant BNSF's motion to dismiss for lack of jurisdiction, which is Document No. 12.

I thought we would begin with Defendant Faught's two motions that we can fully hear, and then turn to BNSF'S motion. Is everybody ready to proceed?

* * *

[91] (A recess was taken from 3:33 to 4:16.)

THE COURT: Please be seated. All right. We're back on the record in Brotherhood of Maintenance of Way Employees Division vs BNSF and Rhonda Faught. I don't have any questions for you, but I am prepared to make a ruling on your motions.

First, with respect to Defendant Faught's motion to dismiss on the basis of sovereign immunity [92] and Defendant Faught's motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim, let me begin by saying that the plaintiffs, in the complaint, do not allege that Defendant Faught violated federal law.

As I understand the argument here today, the plaintiffs contend that Defendant Faught may in the future violate the RLA if, at some point in the future, the JUA were ordered to be reformed and if the Secretary refused to comply with that order.

Defendant Faught's future possible violation of federal law at this time appears to be speculative and premature.

Now by not stating any violation of federal law by Defendant Faught, the complaint fails to state a claim for relief. Additionally, because the complaint does not allege a violation of federal law by Defendant Faught, the Ex Parte Young exception does not apply. So that the complaint in this case violates Eleventh Amendment sovereign immunity.

The agreement between the State and BNSF does not waive sovereign immunity because it only recognizes the federal court as the forum to resolve disputes as between BNSF and the State.

[93] BMWE is not a beneficiary of that agreement or in privity with a party to that agreement. So both motions to dismiss by Defendant Faught are granted.

Now with respect to BNSF's motion to dismiss, the central issue is whether the dispute here can be categorized as a major dispute or a minor dispute under the RLA. If minor, the federal court lacks jurisdiction, and the dispute is subject to compulsory and binding arbitration before a Public Law Board or the National Railroad Adjustment Board.

In contrast, federal district courts do have jurisdiction to hear major disputes under theRLA.

More generally speaking, if a dispute is a matter of interpretation of a collective bargaining agreement, it's a minor dispute. If it's a matter of enforcement, it's a major dispute. But the Conrail case gives us the standards.

Now in Conrail, the Supreme Court adopted the following standard for distinguishing between major and minor disputes. "Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action [94] is arguably justified by the terms of the parties' collective bargaining agreement, where, in con-

trast, if the employer's claims are frivolous or obviously insubstantial, then the dispute is major."

Now the Supreme Court noted that in finding a minor dispute, the Supreme Court has characterized the carrier's burden as relatively light.

Now in determining whether disputes are major or minor, there are a variety of factors that the courts examine. Those are the language of the collective bargaining agreement, any relevant amendments or side letters, the negotiating history of the disputed contract language, past practice under the agreement, arbitration decisions interpreting the contract, arbitration decisions interpreting similar language in other bargaining agreements, the absence of a provision prohibiting the carrier's action, industry practice which might indicate that there is only one reasonable interpretation of the agreement, and the intent behind and the nature of the actions giving rise to the dispute.

Taking those standards into consideration, I find that this dispute is a minor dispute. BNSF's [95] right to sell or otherwise dispose of its property and therefore to transfer the work is supported by several nonfrivolous arguments.

First, BNSF points to many arbitration awards which it contends stand for the principle that when a carrier no longer controls the property to be maintained, then maintenance and improvement work is not within the scope of rules generally governing the relationship between the union and the carrier.

They cite arbitration awards in favor of carriers who delegated maintenance and repair work to lessees or other third parties.

Second, BNSF cites to past practice, pointing out that

on several occasions it has sold a fee interest in a property or right of way to another organization, while retaining for itself operating rights over that land. In those instances, BNSF no longer performed the track maintenance work for that portion of the right of way.

Third, BNSF argues that the dispute is minor because BMWE's own actions cast it as such when it filed claims in arbitration over the work at issue, thereby availing itself of the RLA's minor [96] dispute resolution process.

Fourth, BNSF argues that the collective bargaining agreement itself provides a good faith argument that the dispute here is a minor dispute. BNSF contends that its reduction in force and furlough provisions give it the unilateral right to abolish assignments and reduce the number of maintenance of way positions upon specified notice to the BMWE.

BNSF further points out that it has, on occasion, abolished maintenance of way positions as a result of the sale or lease of a BNSF right of way or of a BNSF facility.

And lastly, BNSF has pointed out that the collective bargaining agreement does not forbid BNSF to sell its lines.

So with that, I will grant BNSF's motion to dismiss. So I will enter an order that basically sets out the dismissal. But I'm not intending to file a lengthy memorandum opinion, so that my order will refer to the comments that I've made in issuing my ruling.

All right. Is there anything further?

MR. CLARKE: No, Your Honor.

MS. GOTTLIEB: No, Your Honor.

[97] (Court in recess at 4:25 p.m.)

APPENDIX E

SERVICE DATE – LATE RELEASE FEBRUARY 6, 2006

SURFACE TRANSPORTATION BOARD DECISION

STB Finance Docket No. 34793

NEW MEXICO DEPARTMENT OF TRANSPORTATION—ACQUISITION EXEMPTION—CERTAIN ASSETS OF BNSF RAILWAY COMPANY

Decided: February 3, 2006

On December 6, 2005, New Mexico Department of Transportation (NMDOT), an agency of the State of New Mexico and a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to acquire from BNSF Railway Company (BNSF) certain right-of-way and trackage, totaling approximately 297.1 miles in Valencia, Bernalillo, Sandoval, Santa Fe, San Miguel, Mora, and Colfax Counties, NM, and Las Animas County, CO. The rail line extends between milepost 932.1 in Belen, NM, on BNSF's El Paso Subdivision and milepost 635.0 in Trinidad, CO, on BNSF's Raton Subdivision.

Notice was served on January 9, 2006, and published in the *Federal Register* on January 10, 2006 (71 FR 1584). Simultaneously with its notice, NMDOT filed a motion to dismiss the notice, asserting that the transaction is not subject to Board regulation because NMDOT will not become a common carrier as a result of the transaction. There is no opposition to the motion. The motion to dismiss will be granted.

BACKGROUND

NMDOT states that, pursuant to a draft purchase and sale agreement between the parties, BNSF would in three separate phases convey to NMDOT the right-of-way, track, and other real property and assets associated with the line, subject to BNSF's retention of a permanent, exclusive freight railroad operating easement. NMDOT states that it would not acquire any rights from BNSF to act as a common carrier and would not be providing service over the line.

NMDOT states that it plans to acquire the line for the purpose of providing commuter rail operations, and that it would not acquire the right or obligation to conduct freight rail service of any kind over the line. NMDOT states that, concurrently with the parties' purchase and sale agreement, BNSF and NMDOT would enter into a joint use agreement governing their respective operations on the line. The joint use agreement provides that: (1) NMDOT would take over responsibility for track maintenance upon acquisition of each segment of the line; (2) BNSF would continue to dispatch all trains [2] operating on the line until after closing on the third phase of the acquisition, at which time NMDOT would have the right to take over dispatching; and (3) commuter service would have priority over freight service during defined operating windows, but only so long as BNSF retained the ability to provide its freight service and Amtrak service was provided in accordance with statutory and contractual standards.[1]

NMDOT maintains that its acquisition does not constitute an acquisition of a railroad line subject to the Board's jurisdiction. According to NMDOT, because it has not

[1] NMDOT attached to its motion draft copies of the purchase and sale agreement, a quit claim deed, and the joint use agreement.

acquired the property and contractual rights necessary to conduct or control common carrier freight rail operations on the line, it has not become a rail carrier providing transportation subject to the Board's jurisdiction. NMDOT cites a number of cases in support of its position that this transaction is not subject to Board regulation.[2]

DISCUSSION AND CONCLUSIONS

The question here is whether the Board's regulatory approval is required for NMDOT to acquire the subject line. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily require Board approval under 49 U.S.C. 10901, even if the acquiring entity is a noncarrier, including a state. *See Common Carrier Status of States, State Agencies*, 363 I.C.C. 132, 135 (1980), *aff'd sub nom. Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982). Board authorization is not required, however, when the common carrier rights and obligations that attach to the lines will not be transferred. *See State of Maine*, 8 I.C.C.2d at 836-37.

The record shows that BNSF would not be transferring common carrier rights or obligations and that NMDOT would not hold itself out as a common carrier performing

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[2] *Status of Eish Universal, Inc.*, 342 I.C.C. 550 (1973); *Los Angeles County Transportation Commission—Petition for Exemption—Acquisition from Union Pacific Railroad Company*, STB Finance Docket No. 32374, *et al.* (STB served July 23, 1996); *United States v. California*, 297 U.S. 175, 181 (1936); *Maine, DOT—Acq. Exemption, ME Central R. Co.*, 8 I.C.C.2d 835 (1991) (*State of Maine*); *State of Georgia, Department of Transportation—Acquisition Exemption—Georgia Southwestern Railroad, Inc.*, STB Finance Docket No. 33976 (STB served July 7, 2000); *State of Georgia, Department of Transportation—Acquisition Exemption—South Carolina Central Railroad, Inc.*, STB Finance Docket No. 34057 (STB served Apr. 30, 2002); and *State of Wisconsin Department of Transportation—Petition for Declaratory Order*, STB Finance Docket No. 34181 (STB served Aug. 1, 2002).

rail freight service. The agreements between NMDOT and BNSF show that NMDOT would acquire only the physical assets but not the contractual rights necessary to conduct, control or interfere with common carrier freight operations on the line. BNSF would continue to provide its freight service over the line. Under these circumstances, we find [3] that NMDOT would not become a rail carrier subject to the Board's jurisdiction as a result of the transaction. Therefore, this transaction does not require Board authorization, and NMDOT's notice of exemption will be dismissed and this proceeding will be discontinued.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NMDOT's motion to dismiss its notice of exemption is granted.

2. The proceeding is discontinued.

3. This decision is effective on its date of service.

By the Board, Chairman Buttrey and Commissioner Mulvey.

Vernon A. Williams
Secretary

APPENDIX F

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

A. CONSTITUTIONAL PROVISION:

Eleventh Amendment to the Constitution of the United States:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens of any foreign state.

B. STATUTES:

1. Judicial Code

(a). 28 U.S.C. § 1331. Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(b). 28 U.S.C. § 1337. Commerce and antitrust regulation; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however*, That the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is

otherwise made in a statute of the United States, where a plaintiff who files the case under section 11706 or 14706 of title 49, originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title.

2. Railway Labor Act, 45 U.S.C. § 151 *et seq.*

(a). Section 2 First, 45 U.S.C. § 152 First:

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

(b). Section 2 Seventh, 45 U.S.C. § 152 Seventh

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

(c). Section 3 First (i), 45 U.S.C. § 153 First (i)

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by the petition of the parties or by either party to the appropriate division of the [National Railroad] Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(d). Section 3 First (m), 45 U.S.C. § 153 First (m):

> (m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(e). Section 3 First (p), 45 U.S.C. § 153 First (p):

> (p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carri-

er, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(f) Section 6, 45 U.S.C. § 156:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time

and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

C. **Rules:**

Rule 19, Fed. R. Civ. P.

(a) **Persons Required to Be Joined if Feasible.**

(1) ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or

impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) ***Joinder by Court Order***. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) ***Venue***. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) **When Joinder Is Not Feasible**. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) **Pleading the Reasons for Nonjoinder.** When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) **Exception for Class Actions.** This rule is subject to Rule 23.